FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 21 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Attorneys for Petitioners.

JOHN W. CRAGUN,
HERMAN J. GALLOWAY,
FRANK K. NEBEKER,
CHARLES J. KAPPLER,
CLINTON D. VERNON,
Of Counsel

INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaties and statutes involved	3
Statement	3
Facts leading up to Shoshone Treaties	4
The Shoshone Treaties	10
Subsequent recommendation and authorization to extinguish title by treaty	14
Benefits of Treaty accepted by respondent	14
Subsequent taking of land recognized in Shoshone treaties as belonging to petitioners	15
Jurisdictional act and proceedings below	16
Specification of errors to be urged	20
Summary of Argument	20
Argument	25
I. The treaty on its face constitutes a recognition of petitioners' title	33
The grant and acceptance of rights of way and other easements in petitioners' land constitute an express recognition of petitioners' title thereto	33
Other judicial decisions sustain position of petitioners	37
The Senate amendment is conclusive on question of recognition	44
The phrase "country claimed" in petitioners' treaty was used as the equivalent of title	47
Treaty provisions construed to enlarge, not diminish rights claimed under it	56
Treaties with Indian tribes should never be construed to their prejudice	58
The territory recognized was the land set forth in petitioners' treaty as supplemented by the territorial descriptions of the other treaties	60
II. External aids to construction confirm petitioners' interpretation of treaty	66
A. Matters leading up to negotiation of the treaties	66
B. The practical interpretation of the treaties	68
Admissions by administrative officers of treaty recognition	70
The court erred in excluding certain documents bearing on administrative construction	71
III. Purported findings of fact do not preclude this Court from properly interpreting petitioners' treaty	74
Conclusion	79

TABLE OF CASES CITED

	Page
Arthur v. Cummings, 91 U. S. 362	45
Asakuru v. City of Seattle, 265 U. S. 332	56
Assiniboine Indian Tribe v. United States (1933), 77 C. Cls. 347, app. dismissed and cert. denied 292 U. S. 606	7, 39, 40, 80
Bailey v. R. R. Co., 17 Wall. 96	62
Beecher v. Wetherby, 95 U. S. 517	25
Bell v. Bruen, 1 How. 169	76
Buttz v. Northern Pac. R. Co., 119 U. S. 55	50
Chavez v. Bergere, 231 U. S. 482	36
Cherokee Nation v. Georgia, 5 Pet. 1	25
Cherokee Tobacco, The, 11 Wall. 616	31
Chott v. Ewing, 237 U. S. 197	62
Clark v. Smith, 13 Pet. 195	50
Coos Bay Indian Tribes v. United States (1938), 87 C. Cls. 143	28
Crow Dog, Ex parte, 109 U. S. 556	27
Crow Nation v. United States (1935), 81 C. Cls. 238	7, 39, 40, 80
Del Monte Min. & Mil. Co. v. Last Chance Min. & Mil. Co., 171 U. S. 55	50
Doe dem. Johnson v. Baytup (1835), 3 Ad. & El. [K. B.] 188, 111 Eng. Reprint 384	36
Duwanish et al. Tribes of Indians v. United States (1934), 79 C. Cls. 530; cert. denied 295 U. S. 755	28
Factor v. Laubenheimer, 290 U. S. 276	56
Fort Berthold Indians v. United States (1930), 71 C. Cls. 308	7, 34, 37, 40, 80
Fremont v. United States, 17 How. 542	64
Galloway v. Finley, 12 Pet. 264	45
Geofroy v. Riggs, 133 U. S. 258	45, 46
Hamilton v. Erie R. Co., (1916) 219 N. Y. 343, 114 N. E. 398, (error dism., 248 U. S. 369)	63
Hanley v. Donoghue, 116 U. S. 1	77
Hauenstein v. Lynham, 100 U. S. 483	56
Hayt, Administrator v. United States (1903), 38 C. Cls. 455	29, 55
Holden v. Joy, 7 Wall. 211	25
Hualapi Case (see United States as Guardian, etc., v. Santa Fe Pac. R. Co., 314 U. S. 339)	
Johnson v. McIntosh, 8 Wheat. 543	25, 26, 27
Jones v. Meehan, 175 U. S. 1	58, 74, 76
Kansas Indians, 5 Wall. 737	58
Ketchum v. Board of Education (1927), 324 Ill. 314, 155 N. E. 332	63
Klamath & Moadoc Tribes of Indians v. United States, 296 U. S. 244	2

	Page
Leavenworth &c. R. Co. v. United States, 92 U. S. 733	25
Market Co. v. Hoffman, 101 U. S. 112	45
Marlin v. Lewallen, 276 U. S. 58	58
Menard's Heirs v. Massey, 8 How. 293	37
Menominee Tribe of Indians v. United States (1941), 95 C. Cls. 232	43
Mid-Northern Oil Co. v. Walker, 268 U. S. 45	45
Minnesota v. Hitchcock, 185 U. S. 373	43
Mitchel v. United States, 9 Pet. 711	25
Nadeau v. Union Pac. R. Co., 253 U. S. 444	50
Nielson v. Johnson, 279 U. S. 47	56,
Northern Pac. R. Co. v. Sanders (C. C. A. 9th, 1892), 49 Fed. 129	49
Northern Pac. Ry. Co. v. United States, 227 U. S. 365	58
Northwestern Bands of Shoshone Indians v. United States, 95 C. Cls. 642, 100 C. Cls. 455 (R. 26, 77)	1
Omaha Tribe of Indians v. United States, 53 C. Cls. 549	65, 80
People v. Cowan (1918), 283 Ill. 308, 119 N. E. 335	62, 63
People v. Frisbie (1866), 31 Cal. 146	49
Richardson v. Harmon, 222 U. S. 96	62
Schulenberg v. Harriman, 21 Wall. 44	63
Seufert Bros. Co. v. United States, 249 U. S. 194	58
Sherman v. Sherman (1909), 23 S. D. 486, 122 N. W. 439	49
Shoshone Tribe of Indians v. United States, 299 U. S. 476, reversing 82 C. Cls. 23; 304 U. S. 11, affirming 85 C. Cls. 331	14, 40, 70, 80
Southern Pac. R. Co. v. United States (N. D. Cal., 1889), 38 Fed. 55	49
Spalding v. Chandler, 160 U. S. 394	63
Sturges v. The Collector, 12 Wall. 19	45
Sullivan v. Kidd, 254 U. S. 433	63
Temple v. United States, 248 U. S. 121	77
Tucker v. Alexandroff, 183 U. S. 424	35
United States v. Belmont, 301 U. S. 324	31
United States v. Brooks, 10 How. 442	32, 55, 65
United States v. Choctaw Nation, 179 U. S. 494	63
United States v. Creek Nation, 295 U. S. 103	28, 79, 80
United States v. Freeman, 3 How. 556	62
United States v. Klamath & Moadoc Tribes, 304 U. S. 119	28, 79, 80
United States v. Minnesota, 270 U. S. 181	43
United States v. Northern Pac. R. Co., 311 U. S. 317	41, 42, 43
United States v. Payne, 264 U. S. 446	58
United States v. Shoshone Tribe of Indians, 299 U. S. 476; 304 U. S. 111	28, 58, 60, 79
United States as Guardian, etc. v. Santa Fe Pac. R. Co., 314 U. S. 339	19, 25, 26, 29, 46, 77
United States v. Stewart, 311 U. S. 60	62
United States v. Winans, 198 U. S. 371	58
Utah & N. R. Co. v. Fisher, 116 U. S. 28	76

Page

Walapi Case (see United States as Guardian, etc. v. Santa Fe Pac. R. Co., 314 U. S. 339) 46
Walla Walla v. Walla Walla Water Co., 172 U. S. 1 45
Wheaton v. Peters, 8 Pet. 591 45
Wichita &c. Indians v. United States (1939), 89 C. Cls. 378 28
Worcester v. Georgia, 6 Pet. 515 ..... 25, 28, 34, 58
Willison v. Watkins, 3 Pet. 43 36
Wilson v. Shaw, 204 U. S. 24 64

TABLE OF STATUTES CITED

R. S. § 1839, 48 U. S. C. § 1451 27
Act for government of the Northwest Territory, August 7, 1789, c. 8, 1 Stat. 50 26
Indian Trade and Intercourse Act, March 30, 1802, c. 13, 2 Stat. 139 26
Indian Trade and Intercourse Act, June 30, 1834, c. 161, 4 Stat. 729 ..... 26, 27
Act of July 1, 1862, 12 Stat. 489 ..... 16, 78
Act of July 5, 1862, c. 135, 12 Stat. 512, 529 (Appendix p. 4) 9, 67
Act of March 21, 1864, 13 Stat. 30 ..... 16, 78
Act of July 2, 1864, 13 Stat. 356 ..... 16, 78
Act of February 23, 1865, c. 45, 13 Stat. 432 ..... 14, 69
Act of July 27, 1866, 14 Stat. 492 ..... 16, 78
Act of June 25, 1868, c. 71, 15 Stat. 76, § 6, 5 U. S. C. § 91 70
Act of July 3, 1890, 26 Stat. 215 ..... 16, 78
Act of July 16, 1894, 28 Stat. 107 ..... 16, 78
Act of February 13, 1925, c. 229, 43 Stat. 936–939, 28 U. S. C. § 288 1

TABLE OF TREATIES CITED

Treaty with the Arapaho and Cheyenne, February 18, 1861, 12 Stat. 1163, 2 Kappler 807 53
Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, 2 Kappler 439 53
Treaty with the Cherokee, August 6, 1846, 9 Stat. 871, 2 Kappler 561 55
Treaty with the Chickasaw, October 19, 1818, 7 Stat. 192, 2 Kappler 174 54
Treaty with the Chippewa, February 22, 1855, 10 Stat. 1165, 2 Kappler 169 53
Treaty with the Chippewa, Bois Fort Band, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916 ..... 53, 54
Treaty with the Chippewa, Red Lake and Pembina Bands, October 2, 1863, 13 Stat. 667, 2 Kappler 853 53
Treaty with the Choctaw, October 24, 1816, 7 Stat. 152, 2 Kappler 137 54
Treaty with the Choctaws, September 27, 1830, 7 Stat. 333, 2 Kappler 310 51
Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706 ..... 51, 52

Page

Treaty with the Creeks, February 12, 1825, 7 Stat. 237, 2 Kappler 214.. 54
Treaty with the Creeks, January 24, 1826, 7 Stat. 286, 2 Kappler 264.. 51
Treaty with the Creeks, August 7, 1856, 11 Stat. 699, 2 Kappler 756.. 53
Treaty with the Delawares, October 3, 1818, 7 Stat. 188, 2 Kappler 170.. 52
Treaty with the Delawares, September 24, 1829, 7 Stat. 327, 2 Kappler 304 52
Treaty with the Eastern Shoshone, July 2, 1863, 18 Stat 685, 2 Kappler 2, 10, 33, 34, 40, 48, 66, 70
Treaty with the Eastern Shoshone, July 3, 1868, 15 Stat. 673....14, 40, 70, 71
Treaty with the Flatheads, July 16, 1855, 12 Stat. 975, 2 Kappler 722.. 53
Treaty with the Florida Tribes of Indians, September 18, 1823, 7 Stat. 224, 2 Kappler 203..... 54
Treaty with Great Britain, June 15, 1846, 9 Stat. 869..... 13
Treaty of Guadalupe Hidalgo with Mexico, February 2, 1848, 9 Stat. 922 13
Treaty of Fort Laramie, September 17, 1851, 5 Kappler 1065..... 7, 37
Treaty with the Iowa, August 4, 1824, 7 Stat. 231, 2 Kappler 208..... 55
Treaty with the Iowa, October 19, 1838, 7 Stat. 568, 2 Kappler 518..... 54
Treaty with the Kalapuya, January 22, 1855, 10 Stat. 1143, 2 Kappler 665 54
Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 2 Kappler 222..... 54
Treaty with the Kaskaskia and Peoria, October 27, 1832, 7 Stat. 403, 2 Kappler 376 ..... 51, 52
Treaty with the Klamath, October 14, 1864, 16 Stat. 707, 2 Kappler 865 ..... 52, 54
Treaty with the Miami, October 23, 1826, 7 Stat. 300, 2 Kappler 278.... 52, 55
Treaty with the Miami, February 11, 1828, 7 Stat. 309, 2 Kappler 286... 54
Treaty with the Mixed Bands of Bannacks and Shoshones, October 14, 1863, 5 Kappler 693 ..... 2, 12, 48
Treaty with the Molala, December 21, 1855, 12 Stat. 981, 2 Kappler 740 ..... 52, 55
Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702 .....52, 53, 55
Treaty with the Northwestern Shoshone, July 30, 1863, 13 Stat. 663 2, 3, 11, 20, 33, 34, 61, 62, 64, 68
Treaty with the Osage, June 2 1825, 7 Stat. 240, 2 Kappler 217..... 55
Treaty with the Otoe and Missouri, September 21, 1833, 7 Stat. 429, 2 Kappler 400 51
Treaty with the Ottawa, August 24, 1816, 7 Stat. 146, 2 Kappler 132.... 54
Treaty with the Pawnee, September 24, 1857, 11 Stat. 729, 2 Kappler 764 53
Treaty with the Peorias, September 25, 1818, 7 Stat. 181, 2 Kappler 165.. 51
Treaty with the Ponca, March 12, 1858, 12 Stat. 997, 2 Kappler 772.... 53
Treaty with the Potawatomi, June 5 and 17, 1846, 9 Stat. 853, 2 Kappler 557 52
Treaty with the Quapaw, November 15, 1824, 7 Stat. 232, 2 Kappler 210 54
Treaty with the Rogue River Tribe, September 10, 1853, 10 Stat. 1018, 2 Kappler 603..... 55
Treaty with the Sac and Fox, September 21, 1832, 7 Stat. 374, 2 Kappler 349 54
Treaty with the Sac and Fox, October 11, 1842, 7 Stat. 596, 2 Kappler 546 51

	Page
Treaty with the Seminoles, May 9, 1832, 7 Stat. 368, 2 Kappler 344	52
Treaty with the Seneca, November 5, 1857, 11 Stat. 735, 12 Stat. 991, 2 Kappler 767	53
Treaty with the Shawnee, November 7, 1825, 7 Stat. 284, 2 Kappler 262	54
Treaty with the Shoshonee-Goships, October 12, 1863, 13 Stat. 681	2, 12, 48
Treaty with the Sioux, August 5, 1851, 10 Stat. 954, 2 Kappler 591	54
Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714	52, 53, 54
Treaty with the Umpqua, September 19, 1853, 10 Stat. 1027, 2 Kappler 606	55
Treaty with the Utah-Tabeguache Band, October 7, 1863, 13 Stat. 673, 2 Kappler 856	55
Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694	53, 54
Treaty with the Wea, October 2, 1818, 7 Stat. 186, 2 Kappler 169	53
Treaty with the Western Shoshone, October 1, 1863, 18 Stat. 689	2, 12, 48, 70
Treaty with the Winnebago, August 1, 1829, 7 Stat. 323, 2 Kappler 300	54
Treaty with the Winnebago, September 15, 1832, 7 Stat. 370, 2 Kappler 345	54
Treaty with the Winnebago, October 13, 1846, 9 Stat. 878, 2 Kappler 565	55
Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698	52, 53, 55
Treaty with the Yankton Sioux, April 19, 1858, 11 Stat. 743, 2 Kappler 776	53
Jurisdictional Act (Act of February 28, 1929, c. 377, 45 Stat. 1407), Appendix p. 1	1, 2, 3, 17
Act of August 12, 1935, c. 508, 49 Stat. 596, 25 U. S. C. § 475a	18
Act of May 22, 1939, c. 140, 53 Stat. 752	1
Executive Order of June 14, 1867, 1 Kappler 838	15, 78

TABLE OF TEXTS CITED

Cohen, *Handbook of Federal Indian Law* (1942)	26, 27, 31
Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916)	29, 35, 57
Hackworth, *Digest International Law* (1940)	30
Herman, *Estoppel and Res Judicata* (1886)	36
Robertson & Kirkham, *Jurisdiction Sup. Ct. U. S.* (1936)	2

TABLE OF OTHER AUTHORITIES CITED

Annual Reports, Commr. Ind. Affs.:	
1849	5, 6
1851	5, 7
1852	5, 6
1853	5
1858	5
1861	6, 7

Page

1863 ..... 9, 14, 69
1864 9
Annual Reports, Commissioner of the General Land Office:
1859 7
1868 ..... 15, 78
1869 ..... 15, 78
Bancroft, H. H., *Works* (1890) 5, 6
Brown, J. G., *Fort Hall on the Oregon Trail* (1904) 4, 5, 6
Confidential Documents [Regular Series] United States Senate, 38th, 39th Cong. 12
Cong. Globe: 37th Cong., 2d Sess. 8
37th Cong. 3d Sess. 9
Cong. Rec. Vol. 51 57
Hebard, G. R., *Washakie* (1930) 4, 5
Home Missions Council of N. Am., Indian Wardship (circa 1943) 27
Manypenny, *Our Indian Wards* (1880) 6
Olden, S. E., *Shoshone Folk Lore* (1923) 4
Scudder, *The Children's Book* (1910) 37
Thwaites, R. G., *Original Journals of the Lewis and Clark Expedition* (1904) 4

Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

OPINIONS BELOW

The first opinion of the Court of Claims is reported in 95 C. Cls. 642, and appears at R. 26; the second opinion is reported in 100 C. Cls. 455, and appears at R. 77.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The jurisdiction of this Court is invoked under § 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., § 288, as amended by the Act of May 22, 1939, c. 140. 53, Stat. 752, and the Act of February 28, 1929, c. 377, 45 Stat. 1407, § 4, Appendix, p. 1, the latter being the special jurisdic-

tional act under which this suit was instituted in the court below.[1] The time within which the petition for writ of certorari could be filed was extended for 60 days from April 3, 1944, by the Chief Justice of the United States on March 13, 1944 (R. 115). The writ was granted May 29, 1944 (R. 115).

QUESTIONS PRESENTED

1. Whether the United States by the treaty of July 30, 1863, 13 Stat. 663, and related treaties,[2] acknowledged or recognized petitioners' Indian title to the lands therein described and identified.

2. Whether, in any event, the United States by the same treaties acknowledged or recognized petitioners' Indian title to the lands as to which petitioners had exclusive right of use and occupancy at the time of the treaty.

3. Whether the policy of the United States has been opposed to the acknowledgment or recognition of the In-

---

[1]The special jurisdictional act provides, *op. cit.*, that from the decision below "an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States." Notwithstanding this statute was enacted subsequent to the Act of February 13, 1925, cited in the text, it is believed that certiorari and not appeal is the proper mode of review. See *Robertson & Kirkham* (1936), *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47, citing *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U. S. 244, 245-6.

[2]Treaty of July 2, 1863, with the Eastern Shoshones, 18 Stat 685 (R. 51); Treaty of October 1, 1863, with the Western Shoshones, 18 Stat. 689 (R. 55); Treaty of October 12, 1863, with the Shoshonee-Goship Bands, 13 Stat. 681 (R. 22); Treaty of October 14, 1863, with the Mixed Bands of Bannocks and Shoshonees, 5 Kappler 693 (R. 60).

dian title to lands within the territory acquired by the United States from Mexico.

TREATIES AND STATUTES INVOLVED

The treaties as negotiated appear in the record (R. 40-51), as well as a Senate amendment to four of them (R. 57). The jurisdictional act under which this suit was instituted (Act of February 28, 1929, c. 377, 45 Stat. 1407) and the statutes authorizing treaties with petitioners are set forth in the appendix (pp. 1-4).

STATEMENT[3]

This suit was brought by the Northwestern Bands of Shoshone Indians (one of five divisions of the Shoshone Nation) to recover damages for the taking by respondent, without petitioners' consent, of all of their ancestral lands located in Southern Idaho, Northern Utah, and Northeastern Nevada. The special jurisdictional act (c. 377, 45 Stat. 1407, Appendix, p. 1) under which the suit was brought, specifically authorized the Court of Claims to render judgment on "any and all claims * * * arising under or growing out of the treaty of July 2, 1863 * * * treaty of July 30, 1863 * * * and any subsequent treaty, Act of Congress or Executive Order", etc. Petitioner alleged that by the treaty of July 30, 1863, and related treaties, respond-

[3]References in this brief to the annual reports of the Commissioner of Indian Affairs are to the individual volumes—not to such reports, differently paged, as combined in the annual reports of the Secretary of the Interior. For the convenience of the Court, extracts from the reports are reproduced in petitioners' Appendix, filed herewith.

ent recognized petitioners' title to the lands herein involved and that the subsequent taking of such land by defendant was in derogation of petitioner's title thus recognized.

The court below held against petitioners on the theory that defendant did not, by these treaties, acknowledge or recognize petitioners' Indian title and that the claim did not therefore arise under or grow out of the enumerated treaties.

In detail the facts upon which petitioners' case is predicated are as follows:

Facts leading up to Shoshone Treaties. Until about 1850 relations between the Shoshones and the whites were peaceful and harmonious. The heroic and unusual assistance given by members of the Shoshone Nation to the Lewis & Clark Expedition, which was largely responsible for our retention and subsequent colonization of the territory now embraced within the States of Washington, Oregon, Idaho and Wyoming, has been credited with making the expedition a success.[4] The early Indian agents and superintendents who were sent among the Shoshone Indians reported that they were "an honest and sober people,

---

[4]The successful accomplishment of the mission entrusted to this expedition by President Jefferson, resulted, it has been said, in "the greatest real estate transaction ever recorded in history". *Olden, S. E., Shoshone Folk Lore* (1923), pp. 14-16. Chief credit for its success has been given to Sacajawea a young Shoshone woman who served as principal guide and interpreter. A band of Shoshones under Chief Cameawat provided horses and other guides. *Olden, Shoshone Folk Lore* (1923), *supra; Brown, J. B., Fort Hall on the Oregon Trail* (1904), pp. 35-37; *R. G. Thwaites, Original Journals of the Lewis and Clark Expedition* (1904), Vol. 2, chaps. XIV and XV, vol. 3, chap. VI; *Hebard, G. R., Washakie* (1930), pp. 25-28.

decidedly,"[5] "uniformly"[6] and "remarkably" friendly to the whites.[7] They were also friendly at all times with the Government of the United States, the Shoshone Tribe, as such, never having at any time, engaged in war with the United States (R. 28).

The whites, however, failed to reciprocate this same helpful attitude. Instead they drove away the sparse game supply and largely destroyed the scant supply of edible vegetation upon which the Shoshones depended for their subsistence. The latter, thus reduced to practical starvation, were forced to "steal or starve" (R. 29).

The gold discoveries in California, Oregon, Nevada, Idaho and Montana in the years 1849 to 1863 greatly stimulated travel over the several routes which passed through the country claimed by the Shoshones.[8] During the first six months of 1850 more than 40,000 persons passed Fort Laramie in Wyoming on their way to the Pacific Coast,[9] during 1863 between 25,000 and 30,000 persons traversed Shoshone territory en route to the Boise

---

[5]Letter of Agent John Wilson, Ann. Rep. Commr. Ind Affs. for 1849, p. 68, p. 70, Appendix p. 7.

[6]Letter of Agent J. H. Holeman, Ann. Rep. Commr. Ind. Affs. for 1851, p. 182, p. 183, Appendix p. 10.

[7]Report of Agent Holeman, Ann. Rep. Commr. Ind. Affs. for 1852, p. 151; appendix p. 13. See also Ann. Reps. of Commr. Ind. Affs. for 1853, p. 444, and 1858, pp. 209, 210; and *Hebard, G. R., Washakie* (1930), pp. 30, 31, 41.

[8]*Bancroft, H. H., Works* (1890), vol. 31 (Washington, Idaho and Montana), pp. 406-442, 611-618; vol. 25 (Nevada, Colorado and Wyoming), pp. 92-120, 224-231, 694-705.

[9]*Brown, J. G., Fort Hall on the Oregon Trail* (1904), p. 308.

mines in northern Idaho.[10] At about the same time, stage coach lines were established, and by 1861 telegraph and overland daily mail lines were being operated through Shoshone country.[11]

This gold-seeking immigration and the ensuing communications and transportation developments proceeded in advance of any arrangements with the Indians of the far west and in utter disregard of their rights.[12] It aroused resentment and hostility, resulting in some instances, in certain bands of petitioner Indians, encouraged by unscrupulous whites, in committing depredations upon emigrant trains (R. 32). This situation made it imperative that respondent make some arrangements whereby white emigrants would be permitted to travel and the Government to maintain the communication system over the lands claimed by the Shoshones (R. 32).

As early as 1849, Indian agents and superintendents recommended that the United States negotiate treaties with the Shoshone Indians which would secure for the whites the right to traverse Shoshone country,[13] and thereby establish peace. In 1851, a delegation of 60 Shoshone chiefs and headmen were invited and taken to Fort Laramie, Wyoming, by agents of respondent, where, along with the

---

[10] *Bancroft, op. cit.*, vol. 31, pp. 413, 427. In 1852 Indian Agent J. H. Holeman reported that while travelling for a distance of approximately 400 miles along the Emigrant Road in Nevada and Utah he passed on an average of about 300 wagons a day. Ann. Rep. Commr. Ind. Affrs. for 1852, pp. 10, 152, quoted in appendix, p. 13.

[11] *Brown, J. G., Fort Hall on the Oregon Trail* (1904), p. 345; *Bancroft, op. cit.*, vol. 25, p. 230; Ann. Rep. Commr. Ind. Affs. 1861, p. 135, quoted in appendix, p. 16.

[12] *Manypenny, Our Indian Wards* (1880), p. 181.

[13] Ann. Rep. Commr. Ind. Affs. 1849, pp. 66-68, quoted in the appendix, pp. 5-8; see also R. 32.

Fort Berthold (Gros Ventres, Arrickarees, and Mandans), Sioux, Cheyenne, Arapahoe, Crow, and Assiniboine tribes, they attended a treaty council to negotiate a treaty with the United States. The United States Commissioners, however, doubted whether their instructions authorized the inclusion of the Shoshone Nation.[14] Consequently the treaty which was concluded at Fort Laramie[15] while it included the other tribes above named, did not include the Shoshone Nation.[16]

In 1859, the Surveyor General of the Territory of Utah urged that before any additional surveys of land were undertaken, the "Indian title" should be extinguished.[17] In 1861 the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant to them "annuities in consideration of a right-of-way across their country." [18] In the same year the Superintend-

---

[14]Ann. Rep. Commr. Ind. Affairs, 1851, Exec. Doc. No. 2, 32d Cong. 1st Sess., p. 445, quoted in Appendix, p. 10.

[15]4 Kappler 1065.

[16]Certain of the lands described in the Fort Laramie treaty were later taken by the United States, as a result of which the Indian tribes concerned recovered judgments against the United States on the ground that such treaty acknowledged and recognized their title to such lands. (*Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 331-332; *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370-371, appeal dismissed and certiorari denied 292 U. S. 606; *Crow Nation* v. *United States*, 81 C. Cls. 238).

[17]Letter of October 6, 1859 from S. C. Stambaugh, Surveyor General of the Territory of Utah, to Commissioner General Land Office, Ann. Rep. Commr. G. L. O. 1859, pp. 199-204.

[18]Ann. Rep. Commr. Ind. Affs. 1861, p. 25 (p. 642 in Report of Secretary of the Interior for 1861), Appendix p. 15, as follows:

> "The Shoshones, or Snakes, and the Flatheads, are wealthy and powerful, and can cause their hostility to the remote settlers and the overland immigration to be

ent of Indian Affairs for the Territory of Utah (later one of the treaty commissioners), recommended negotiation of a treaty whereby the Shoshones would "cede to the United States *all the lands they claim* in this Territory" except certain reservations (R. 31).

On February 26, 1862, the Secretary of the Interior, in reporting on a resolution of the House of Representatives instructing its Committee on Indian Affairs to "inquire into the expediency of making an appropriation to defray the expenses of holding treaties with the Indians in Utah, with a view to the purchase of their lands", acknowledged that the land was "owned by the Indians" but reported that very little of it would "be required for settlement for many years." Accordingly, he did not recommend a purchase of the lands. The Committee on Indian Affairs thereupon recommended to Congress that it negotiate a treaty not for the purchase, but for passageways over the land claimed by the Shoshones.[19]

On July 5, 1862 (12 Stat. 512, 529) Congress authorized the appointment of a treaty commission to negotiate

---

severely felt. Hence, the pressing necessity of some speedy arrangement with them, which with the Snakes it is suggested should be (as a temporary measure) a treaty granting annuities in consideration of a right-of-way across their country."

[19] When the resolution authorizing an appropriation of $20,000 for the negotiation of a treaty was before the Senate, Senator James W. Nesmith of Oregon explained: "They [the Shoshone Indians] say now that if the Government will make them some presents, they are willing to come to terms and permit our people to pass and repass through their country without interruption; and that is the object for which this amendment is incorporated in the bill." "The object of this amendment, as I understand, is not for the purpose of making a treaty that contemplates the purchase of any land." *Cong. Globe*, 37th Cong., 2d Sess., p. 2092.

such a treaty (R. 32). The President appointed James Duane Doty[20] Superintendent of Indian Affairs and later Governor of the Territory of Utah, Luther Mann, Indian Agent in the same Territory, and Henry Martin, Esq., a former Superintendent of Indian Affairs for the Territory of Utah, as Treaty Commissioners.

Pursuant to the Act of July 5, 1862, the Commissioner of Indian Affairs instructed the special commission appointed to treat with the Shoshones, *inter alia* (R. 34):

> "It is not expected that the treaty will be *negotiated with a view to the extinguishment of the Indian title to the land*, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to

[20]Superintendent Doty had been appointed by President Lincoln to take charge of Indian affairs in the Territory of Utah late in 1861, and he continued to serve in that capacity until 1864. In 1863 he was appointed Governor of the Territory, which position he held until his death in 1865. He was a lawyer, judge and statesman who was on terms of friendship with many of the most eminent men of his day, and had held positions in state and national councils, having been a member of the Michigan Legislature and a delegate and later a Representative in Congress from the State of Wisconsin. The comments of Senators Doolittle and Wilkinson on the floor of the Senate on Feb. 25, 1863, are indicative of the high esteem in which Supt. Doty was held. Supt. Doty was praised highly for his ability and integrity and referred to as a very able man who had no superior. *Cong. Globe*, 37th Cong. 3d Sess., pp. 1281-1282. (See also Ann. Rep. Commr. Ind. Affs. 1863, p. 418.) During the period of time he was Superintendent of Indian Affairs in Utah, he traveled among the Shoshone Indians and became familiar with their country and conditions. (Ann. Reps. Commr. Ind. Affs. 1863, pp. 395-396, 420, appendix pp. 20-24; 1864, 174-176, appendix pp. 26-29).

> their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; *also a definite acknowledgment as well of the* ***boundaries of the entire country they claim as of the limits within which they will confine themselves,*** which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

The Shoshone Treaties. The above instructions contemplated the making of one treaty with the entire Shoshone Nation. The treaty commissioners, however, finding it impossible to assemble the entire Shoshone Nation together at one time (R. 39) met separately with each of its five divisions (R. 39), and negotiated five separate treaties, each succeeding treaty either substantially repeating or incorporating the provisions of the prior treaties (R. 40-51).

They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685 (R. 40). By this treaty the parties mutually agreed that a "firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States" (Art. I, R. 40). The Shoshones on their part agreed that routes of travel through "Shoshonee country" should remain forever free and safe for the use of the United States "and of all emigrants and travellers under its authority and protection"; that the United States may establish military agricultural settlements and military posts" along said routes, maintain ferries over rivers wherever required, erect houses and settlements at such points in such country "as may be necessary

for the comfort and convenience of travellers" (Art. II, R. 40), operate and maintain "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country", and operate a transcontinental railway "through any portion of the country claimed by" the Shoshones (Art. III, R. 40-41). It described and set forth the northern, eastern, and southern boundaries of the Shoshone country, as defined and described by said nation (Art. IV, R. 41), but left the "western boundary * * * undefined" since there were no "Shoshones from that district of country present." The United States on its part "in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements * * * and the rights and privileges" conceded by the Shoshonee, agreed to pay the sum of $200,000 in twenty annual installments of $10,000 each (Art. V, R. 41).

On July 30, 1863, the commissioners met with the Northwestern Bands of Shoshone Indians (the present petitioners),[21] and concluded a treaty (13 Stat. 663) at Box Elder, Utah. This treaty, which also declared for a perpetual peace (Art. I, R. 43), incorporated by express reference and adoption all the provisions of the Ft. Bridger treaty (Art. II, R. 43). The petitioner Indians thereby granted the same rights of way and easements over their lands as were granted by the Eastern Shoshones over the land described in their treaty. The Box Elder treaty did not purport to describe the land of all the Northwestern Shoshone bands but did describe the "country claimed by Pokatello [a chief of petitioner Indians] for himself and

[21] This treaty will hereafter be referred to either as the Northwestern Shoshone Treaty, or the Treaty of Box Elder.

his people," as being bounded on the west by Raft River and on the east by Porteneuf Mountains (Art. IV, R. 44). The United States, on its part, agreed to increase the twenty year annuity of $10,000 provided in the Eastern Shoshone treaty to $15,000 (Art. III, R. 43-4).

Like treaties were entered into with the Western Shoshones on October 1, 1863 (18 Stat. 689, R. 44-47), the Shoshonee-Goship Bands on October 12, 1863 (13 Stat. 681, R. 47-49), and the Mixed Bands of Bannacks and Shoshonees on October 14, 1863 (5 Kappler 693, R. 49-51), which together with the Eastern and Northwestern Shoshones constitute the entire Shoshone Nation. The successive treaties either repeated substantially the undertakings of the Ft. Bridger treaty or incorporated it and the intervening treaties by reference.[22] The twenty-year annuity, already increased to $15,000, was increased in the aggregate to $21,000. Apparently all of the various chiefs were illiterate, since they indicated their assent to the respective treaties by mark.[23]

The complete boundaries of the Northwestern Shoshone lands are determined by collocation of the territorial descriptions set forth in the five treaties. These boundaries are also set forth on a map prepared by Governor Doty, Chairman of the Treaty Commissioners, showing the ex-

---

[22]Northwestern Shoshone Treaty, Art. II, R. 43; Western Shoshone Treaty, Arts. II-III, R. 45; Shoshonee-Goship Treaty, Arts. II-III, R. 48; Mixed Bands Treaty, Art. II, R. 50.

[23]The nine chiefs who thus gave their assent were Pokatello, Toomontso, Sanpitz, Tosowitz, Yohnoway, Weeraksoop, Pahragoosahd, Tahkwetoonah and Omashee. For names of chiefs assenting to all treaties and a reproduction of their marks see 18 Stat. 685-7, 13 Stat. 663-4, 13 Stat. 681, 682, 18 Stat. 689, 691, and Vol. 59 *Confidential Documents [Regular Series] United States Senate*, 38th, 39th Congress, pp. 111-2.

terior boundaries of the Shoshone Nation and the lines of the country occupied and claimed by each of the five different divisions of the Shoshone Nation, as set forth in the five various treaties (R. 51, 54, 55). This map accompanied the treaties when they were sent to the Senate for ratification (R. 57, 100-101). In 1939, the General Land Office prepared a large map based on the descriptions set forth in the treaties and on modern surveys. (Plaintiff's Exhibit No. 5, transmitted with record to this Court.) That map, both as to the exterior boundaries of the Shoshone Nation and as to the interior boundaries of the five Divisions, including the complete boundary of Northwestern Shoshone land determined by reading together the territorial descriptions contained in the five treaties, conforms very closely to the map prepared by Governor Doty (R. 30).

This map shows 6,067,000 acres of Northwestern Shoshone land to be located in southern Idaho, sovereignty over which was conceded to the United States by the Oregon treaty of June 15, 1846 with Great Britain (9 Stat. 869). It also shows 6,389,000 acres to be located in northern Utah and 3,187,000 in northwestern Nevada, sovereignty over which was conceded to the United States by the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, with Mexico (9 Stat. 922) under which we obtained the Mexican cession.

Before ratification by the Senate, that body added an amendment to each of the treaties (except the treaty with the Western Shoshones), which expressly provided that nothing therein contained should be construed to admit of any greater title or interest in the lands than existed in the tribe under Mexican law (R. 57). The petitioners ratified and accepted the Senate amendment. (R. 57).

Subsequent Recommendation and Authorization to Extinguish Title by Treaty. After the executed treaties had been received by the Commissioner of Indian Affairs, he recommended in his Annual Report for 1863 "that measures be taken for the negotiation of further treaties with the [Shosone] Indians, having for their object the extinguishment of their title to the soil * * *."[24] By Act of Congress approved February 23, 1865 (13 Stat. 432) Congress authorized the President to enter into treaties with the tribes of Indians in Utah Territory for the surrender to the United States of their possessory right to all agricultural and mineral lands in said territory and for their segregation on reservations (R. 58-59). A treaty was subsequently (July 3, 1868) negotiated with the Eastern Shoshones by which they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673 (R. 59). For the taking of these substituted lands, they recovered in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476; 304 U. S. 111. No further treaty or agreement was ever negotiated or attempted to be made with petitioner bands (R. 59).

Benefits of Treaty Accepted by Respondent. From the outset, the rights granted by the Shoshonees in their land were recognized to be of great importance and value to respondent. As early as November 10, 1863, before the treaties had been ratified, Governor Doty wrote the Commissioner of Indian Affairs, as follows (R. 54):

> "The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental tele-

---

[24] *Ann. Rep. Commr. Ind. Affairs* (1863), pp. 37-8, Appendix pp. 18-19.

> graph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent."

The use by respondent of the easements granted of the routes of travel, of agricultural settlements and military posts, of telegraph and overland stage lines, of a continental railway in and through Shoshone country—have in large part enabled the United States and its citizens to peacefully colonize six of the forty-eight states of our country (Utah, Idaho, Nevada, California, Oregon, and Washington) with all of their vast resources.

Subsequent taking of land recognized in Shoshone Treaties as belonging to petitioners. It is uncontradicted that practically all of the land claimed by petitioners (as set forth in petitioners' and related treaties) and for which compensation is sought, has been taken and is now possessed by the United States, or by its vendees. Thus, a few years after ratification of the Box Elder Treaty (before the year 1870), the United States opened land offices in Utah, Idaho and Nevada and extended the homestead and other public land laws to the area claimed and occupied by the plaintiff Indians, and began disposing of the lands.[25] Grants of large areas were made to railroads and to the states for school and other public purposes; forest reserves were created and lands were patented to homesteaders and other settlers; and a part of the land was set aside as the Fort

---

[25] *Ann. Reps. Commr. G. L. O.* 1868, pp. 55-68, and 1869, pp. 163-174, 177-184.

Hall Indian Reservation for other bands of Indians[26] (R. 98-100). Under the procedure adopted by the Court of Claims with respect to Indian cases [Rule 39 (a)], that court first rules upon the right of plaintiffs to recover; and it is only upon and after a holding that they are entitled to recover that proof of damages is undertaken. Accordingly the entire evidence as to the extent to which the United States has taken the lands described in the treaties for its own use, including the sale thereof to its own citizens is not yet in the record, for as will be later set out in detail, the court below on the first hearing held plaintiff was not entitled to recover for any of this land.

Jurisdictional Act and Proceedings Below: From the time the United States exercised sovereignty over Shoshone country petitioner Indians have been under its tutelage and dependent upon it for protection. No attempt seems ever to have been made to afford any measure of redress until December 9, 1927 when Senator King of Utah introduced S. 710 (70th Cong.) which conferred jurisdiction on the Court of Claims:

> "to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United

[26]Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356; and Act of July 27, 1866, 14 Stat. 292 (railroads). Enabling acts granted certain sections to Utah, Nevada and Idaho for schools and other public purposes. See Act of July 3, 1890, 26 Stat. 215 (Idaho); Act of July 16, 1894, 28 Stat. 107 (Utah); and Act of March 21, 1864, 13 Stat. 30 (Nevada). In connection with establishments of forest reserves see Replies of Ass't. Secretary of Interior dated April 29, 1936, R. 96-97. For establishment of Fort Hall Indian Reservation see Executive order of June 14, 1867, 1 Kappler 838.

States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, pages 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 663—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

The bill thus introduced, was referred in the usual course to the Secretary of Interior for a report as to the claims of petitioner Indians. The Secretary, in reporting the purpose of the bill, stated (*S. Rep. No. 519, 70th Cong., 1st Sess.*):

> "The records show that the northwestern bands of Shoshone Indians were parties to the treaty of July 30, 1863 (13 Stat. 663), by which they affirmed the treaty of July 2, 1863 (18 Stat. 685), between the United States and the eastern band of Shoshone Indians.
>
> "The northwestern bands of Shoshones are, *under the treaties mentioned,* asserting claims against the United States for large tracts of land in northern Utah and Nevada, and in southern Oregon and Idaho, and which lands, they allege, were disposed of by the Government without a cession by or consent of these Indians." (Italics added.)

Said bill, without any change in the above quoted language was enacted into law and became the jurisdictional act under which this suit was instituted (Act of Feb. 28, 1929, c. 377, 45 Stat. 1407; appendix p. 1). A

petition pursuant to the foregoing act was filed in the court below March 28, 1931 (R. 1). The court below rendered special findings of fact (R. 26) and an opinion (R. 63) upon which it was concluded that petitioners were not entitled to recover under the Treaty of July 30, 1863, or related treaties, for a taking of any portion of the land described in the treaties (R. 62). Petitioners were held entitled to recover for a deficiency of $10,800.17 for annuities promised by the treaty of July 30, 1863; but upon a further hearing with respect to the offsets of gratuitous expenditures made for Indian tribes which are required by the Act of August 12, 1935, c. 508, 49 Stat. 596; 25 U. S. C. Sec. 475a, it was held that the offsets precluded any recovery. The petition was thereupon dismissed (R. 77-79).

The court below purported to find as a fact that "the United States, in making and ratifying the treaty [of Box Elder] did not intend it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians" as against the United States in the whole or any part of the territory encompassed within the treaty of 1863 (R. 55-56, 58), particularly as "to any territory which was within the Mexican cession" (R. 58). The court acknowledged (R. 72; see also R. 66) that the record is sufficient to show that petitioners, so far as other tribes were concerned, exclusively occupied and used all or a portion of the territory involved in their present claim as their aboriginal home, but held that any claim for a taking of that aboriginal title did not arise under or grow out of the treaty within the terms of the jurisdictional act. The court further purported to find that "the United States has ever exercised dominion and complete ownership over the territory and land for which plain-

tiff bands now seek to recover compensation"; and that prior to and at the time of the treaty the United States had not recognized any right of exclusive occupancy in plaintiff tribe as against the United States to any territory in the Mexican Cession (R. 58). Petitioners contend that these findings are conclusions of law, plainly at variance with the conclusions which must be drawn from the facts found by the court. To the extent that there was any evidence with respect to these conclusions, they are completely unsupported in the record. That evidence has been brought before the Court and is wholly to the contrary.

The court below also held as to lands within the Mexican cession that in making the treaty with petitioner tribe the Executive Department and the Senate had in mind a desire not to recognize in the Indians "any possessory use or occupancy right, title or interest as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner thereof; that since the Indians had no possessory, occupancy, or other rights therein which were to be in any manner respected, the United States was under no obligation to treat with the Indians occupying the same for the extinguishment of their title" (R. 71). Although the court, in so holding, purports to follow *United States as Guardian, etc.* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, petitioners contend that the holding of the court below does violence to the *Santa Fe* case.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that the word "claim", as used in Indian treaties, is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. In holding that a treaty of "peace and amity" with an Indian tribe does not constitute an acknowledgment or recognition by the United States of the Indian title of the Indians to the lands they used and occupied.

3. In holding that the treaty of July 30, 1863, 13 Stat. 663, and related treaties, did not constitute an acknowledgment or "recognition" of petitioners' title to land.

4. In holding that as to land claimed by Pokatello and his Band, the Treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' title.

5. In making and entering Finding No. 15.

6. In making and entering Finding No. 21.

7. In refusing to admit in evidence Plaintiff's Exhibit 4 filed March 4, 1941.

8. In holding that petitioners are not entitled, under the Treaty of July 30, 1863, and related treaties, to recover for the taking of their lands by respondent.

SUMMARY OF ARGUMENT

When migration through petitioners' country made necessary some arrangement with petitioners, the United

States was faced with the alternatives of outright extinguishment of petitioners' Indian title by conquest; or of purchase of such rights in their lands as were required (that is, by proceeding in recognition of rather than in opposition to petitioners' title); or of simply ignoring their Indian title and proceeding to dispose of their lands without any arrangement at all. The United States chose to proceed in recognition of petitioners' right to allow or withhold the desired privileges, and purchased the rights it wished, through formal treaty with petitioners. The court below, despite the treaty, disposed of the case as though petitioners were not under treaty with the United States. In doing so, it overlooked the normal principle of international law that a treaty necessarily implies some lawful national domain on the part of the respective parties.

In the treaty with petitioners, the United States acquired rights of way for travel through the Shoshone country; the right to establish "military agricultural" settlements; maintain ferries; erect houses; operate telegraph and overland stage lines and a transcontinental railway through the Shoshone country. Thereby the United States recognized that petitioners owned the country and could grant these licenses or easements; and the Indians could not have understood, from such a treaty, that the United States was not proceeding in recognition of the Indian right. As a matter of law, where one party obtains possession of real estate from another, he cannot be allowed to dispute the original title of him by whom he has been let into possession. The United States, as a party to a conveyance of land, is subject to this principle of estoppel. Decisions of the courts in other cases have held that where a right of way is obtained through Indian lands by treaty,

the United States recognized that the Indians owned the lands by right of occupancy, and that any subsequent taking of such land creates a cause of action arising under or growing out of the treaty. And where the Shoshone treaties of which petitioners' treaty is a part have heretofore been before the courts, they have been read as treaties creating "reservations". The fact that the United States might dispose of lands, thus recognized, to others without the consent of the Indians does not mean that in a suit by the Indians the United States is not bound to account for the rights thus taken.

An amendment to petitioners' treaty, incorporated by the United States Senate, demonstrates that the Senate understood the treaty recognized petitioner's title; for the Senate provided that the treaty should not be construed as admitting "any other or greater title or interest in the lands within the territories described in said treaty" than existed in the Indians upon the acquisition of the territories from Mexico by the laws thereof. The Senate indicated it understood the treaty recognized petitioners' title at least as to lands lying outside the Mexican cession, and even to lands inside the cession so far as petitioners had title under Mexican law. It cannot be supposed that the treaty did not recognize petitioners' title; for that would attribute to the Senate, in adopting the amendment and its subsequent ratification by petitioners, a wholly meaningless act.

The express provision in petitioners' treaty, Art. IV, that "The country claimed by Pokatello" lay within limits therein set forth constitutes an express recognition to so much land as is described; for the word "claim" is used in the sense of *title*, not merely the demand or pretension of a right. It is frequently so used as between whites; and in mining law, a "claim" is mining property owned by a

miner—not something to which he asserts an unrecognized right. In Indian matters the case is even clearer; and the word "claim" has been habitually used for generations as meaning "Indian title". This Court has so used the word; and it has been used in scores of treaties in a way clearly showing that lands "claimed" by the Indians are lands owned by them under the Indian title.

The court below ought to have construed petitioners' treaty in accordance with the traditional view that treaties should be construed to enlarge, not diminish, the rights which may be claimed under them. One party, in the courts of the other to which alone it can appeal, especially merits this consideration; for we are too self-respecting a nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. Furthermore, this Court has ruled again and again that in construing treaties with an Indian tribe, all doubts must be resolved in favor of the Indians.

The lands embraced in petitioners' country are shown from the series of five treaties with the Shoshone Nation of which petitioners' treaty is a part, as corroborated by the map which was drawn by the treaty commissioner and which was before the Senate when the treaty was ratified. There is, therefore, no difficulty in determining the precise lands with which the treaty deals.

The interpretation of the treaties for which petitioners contend is supported by external aids to their construction. The matters leading up to the negotiation and execution of the treaties show that Congress had in mind that treaties would be negotiated only to secure rights of way, and not, as had been recommended, to extinguish to Indian title. After Congress authorized the treaty, the Com-

missioner of Indian Affairs instructed the commissioners appointed to negotiate the treaty that it should not be negotiated with a view to extinguishing the Indian title, but that they should secure an agreement to render secure for travel the routes through Shoshone country. The practical construction of the treaty following its execution also shows that the treaty was understood to have recognized petitioners' title; for administrative officials of respondent sought, and the Congress granted, authority to extinguish by treaty petitioners' title to their land. No treaty pursuant to this authority was ever negotiated with petitioners. Even after this suit was instituted, administrative officers having to do with Shoshone lands still read petitioners' treaty as having recognized petitioners' title to their country. The court below erred in excluding from evidence some of the documents showing these admissions of administrative officials.

The purported "findings of fact" of the court below that the United States did not negotiate or agree with respect to any acknowledgment or recognition of petitioners' title, and that the United States has ever exercised dominion and complete ownership over the lands for which petitioners claim compensation, are exclusively conclusions of law reviewable by this Court. Even if they were questions of fact, there is no evidence to support them. The fact that the United States has disposed of petitioners' lands does not go to show that petitioners never owned them. Even though the United States has power to dispose of Indian lands without the consent of the Indians, its disposition of their lands without their consent is a breach of treaty. Breach of agreement with the Indians does not prove that the Indians never had a contract recognizing

their right to the lands; and, after the granting of a jurisdictional act, petitioners are entitled to recover for the wrongful disposal of lands recognized as belonging to them.

ARGUMENT

When the rising tide of migration, and the necessity for overland railroad and telegraph lines through the lands of the Shoshone Indians made it necessary to come to some settlement with them of their rights, and the rights of respondent in their country, the United States was faced with certain alternatives:

In the first place, the United States could appeal to the sword and extinguish the Shoshone "Indian title"[27] by right of conquest. *United States as Guardian etc.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347; *Johnson* v. *McIntosh*, 8 Wheat. 543, 587. If the United States thus proceeded in opposition to the rights of the Shoshones, including petitioners, no court could question the power of the United

[27] From time immemorial prior to the negotiation of the treaty, petitioners had possessed an "Indian title", protected by the laws of the United States. This Indian title has been frequently defined by this Court as the right of the tribe to the use and occupancy of the soil to the exclusion of any other persons or the United States, but with a co-existing "ultimate fee" in the United States —that is, the ultimate exclusive right of the United States to assume ownership of the lands theretofore under the Indian title when that use and occupancy shall be terminated, together with the exclusive right to extinguish that Indian title. *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, 588-596, 603; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 48; *Worcester* v. *Georgia*, 6 Pet. 515, 544-547, 552, 560; *Mitchel* v. *United States*, 9 Pet. 711, 745-746; *Holden* v. *Joy*, 7 Wall. 211, 243-4; *Leavenworth &c. R. Co.* v. *United States*, 92 U. S. 733, 742-743; *Beecher* v. *Wetherby*, 95 U. S. 517, 525-526; *United States as Guardian &c.* v. *Sante Fe. Pac. R. Co.*, 314 U. S. 339, 345, and cases cited.

States thus to acquire the territory of the Indians. "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." Marshall, C. J., in *Johnson* v. *McIntosh*, 8 Wheat. 543, 588.

Secondly, the United States might proceed peaceably by compact with the Indians to purchase from them such rights in their lands as were required by the United States and its citizens—that is, to proceed in recognition of, and not in opposition to, their right to allow or to withhold the privileges desired. The latter alternative would accord with the historical attitude[28] toward the aboriginal occupants of this

---

[28]This Court has rather recently reviewed the policy of respecting the Indian title, in *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 348. The consistent policy of the United States from the earliest days has been to protect the Indian tribes within our borders in the use and enjoyment of their lands. Commencing with the first Congress, when the statute for government of the Northwest Territory was adopted (Act of August 7, 1789, c. 8, 1 Stat. 50), it was provided—

> "Art. 3. . . . The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

The Indian Trade and Intercourse Act of March 30, 1802, c. 13, 2 Stat. 139,141, §§ 4, 5, and that of June 30, 1834, c. 161, 4 Stat. 729, 730, §§ 8, 9, 10, 11, 12 and earlier temporary acts (the latter being reviewed and summarized in *Cohen, Handbook of Federal Indian Law* [1942], pp. 306-7), accorded protection to the Indian title. *United States as Guardian* v. *Santa Fe Pac. R. Co., supra.* Thus, too, in the various acts of Congress estab-

continent from the time of the earliest discoveries by Europeans until and following the founding of the United States —that the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" (*Johnson* v. *McIntosh*, 8 Wheat. 543, 574);

---

lishing the respective territories there was uniformly inserted the provision (later R. S. § 1839; 48 U. S. C. § 1451)—

> "Nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any Territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any Territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any Territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular Territory."

This policy extended to and embraced petitioners' lands; for "Indian country", as referred to in the Indian Trade and Intercourse Acts, was defined by the Act of 1834 as follows:

> "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river not within any State, to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

(This provision was repealed by reason of its omission from the Revised Statutes; but this Court has used it as the basis of determining the meaning of criminal statutes relating to the "Indian country". *Ex parte Crow Dog*, 109 U. S. 556, 561.)

It has been calculated that 389 treaties were entered into with the Indian tribes by the United States. *Home Missions Council of N. Am., Indian Wardship* [circa 1943], p. 37, see *Cohen, Handbook of Federal Indian Law* (1942), Annotated Table of Statutes and Treaties, p. 485.

that "The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them" (*Worcester* v. *Georgia*, 6 Pet. 515, 547). By its very nature, this alternative of admitting or acknowledging or recognizing petitioner's title, precluded any subsequent taking of petitioners' land, without rendering the United States, upon Congress authorizing suit, liable therefor (*United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123). In petitioners' case this was the alternative actually chosen.

A final alternative—that of neither extinguishing by war (at least by formal war) nor of purchasing what was required by the United States and recognizing Indian title to the balance—was that of proceeding to occupy or dispense the lands without any binding[29] arrangement with the Indians at all. The court below, by holding that the treaty with petitioners did *not* amount to a "recognition or acknowledgment" of their title, assimilated the case to this last alternative. It relied upon certain of its own cases (*Duwamish, et al. Indians* v. *United States* (1934), 79 C. Cls., 530, 599-600, cert. den. 295 U. S. 755; cf. *Coos Bay Indian Tribes, et al.* v. *United States* (1938), 87 C. Cls. 143, 153; *The Wichita Indians* v. *United States*

---

[29]Certain hard cases, not within the ambit of the present brief, exist in our Indian relations—namely, those where the Indians have been induced to give up their lands immediately upon the negotiation of treaties for cession of the lands, after which the treaties failed of ratification by the Senate. Compare the cases of the California Indians discussed in the opinion below, R. 71; *Coos Bay Indian Tribe* v. *United States* (1938), 87 C. Cls. 143, 153.

(1939), 89 C. Cls., 378, 420),[30] holding that in the absence of a treaty Indian tribes are not entitled to recover, and denied relief.[31]

Thus the court below confused "treaty" with "non-treaty" cases. In doing so, the court overlooked the normal and necessary principle of international law that the mere negotiation of a treaty, in the absence of an express disclaimer or contradictory provisions, constitutes a recognition of title or sovereignty of the respective parties to the territory possessed and occupied by each other. The law of nations has generally recognized that even a "treaty of peace and friendship" implies acknowledgment of the territorial integrity of the parties, and that the "status existing at the time the treaty of peace was signed is, unless a contrary intention is clearly expressed, contemplated by the parties".[32] A party would not be recognized as existing at

---

[30]The cases relied upon have never been reviewed or approved by this Court. These cases are thrown in the gravest doubt by the later decision of this Court in *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347.

[31]The court below also cited *Hayt* v. *United States* (1903), 38 C. Cls. 455, 462. That case is not, like the others cited, a "non-treaty" case, since it involved Indians under a treaty rather similar to that of petitioners. However, the case did not involve the rights of the Indians as against the United States for any taking of their Indian title to their lands. And it was based upon a doctrine—that the policy of the United States was opposed to the recognition of the Indian title in lands acquired from Mexico—which now stands repudiated by this Court. *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345-346.

[32]*Crandall, Treaties, Their Making and Enforcement* (2d ed., 1916), Sec. 159, p. 352. Unlike the present treaties, the United States and others have in some cases made it an express condition of recognition "that the recognition should not prejudge the question of the eventual frontiers". See *Hackworth, Dig. Int. Law* (1940), vol. 1, § 103, p. 715. Thus, "The United States recognized the *de facto* government of the Armenian Republic on April 23, 1920, on the condition that the territorial frontiers should be left for later determination." *Ibid.*

all, let alone regarded as capable of contracting a treaty, if it had no lawful territory.[33]

Respondent has conceded that "an Indian treaty, like an international treaty, may import recognition 'of the territorial integrity of the parties,'" but insists that an Indian title is subordinate to its own title and that consequently a treaty with an Indian tribe does not imply an "acknowledgment that the Indian title is valid as against the United

---

[33] *Hackworth, Dig. Int. L.* (1940), vol. 1, § 104, p. 725-726, cites the case of *German Continental Gas Co.* v. *Polish State*, IX Recueil des decisions tribunaux arbitraux mixtes (1929-30), 336, 346, translation. There it was urged Poland, though recognized, could not be considered as possessing Warsaw *de jure*, since it had belonged in law to Russia and had not been ceded to Poland. The German-Polish mixed arbitral tribunal, however, ruled:

> "But, whatever may be the importance of delimitation of frontiers, one cannot go so far as to contend that as long as this delimitation has not been juridically decided, the state in question cannot be considered as having any territory whatever. Here, also, the practice of international law and historical precedents indicate the contrary. In order that a state should exist and could be recognized as such with a territory without which it could not either exist or be recognized, it is sufficient that this territory should have a sufficiently certain consistency (even though its frontiers should not have been accurately delimited) and that, on this territory, the state should actually exercise national public authority in an independent manner. There are numerous examples of cases in which states have existed unquestionably, have been recognized and have been recognized mutually at a time when their frontier between them had not yet been accurately fixed. In this connection, it is unnecessary to recall the international arbitrations which have fixed the boundary between the Argentine Republic and Chile and the more recent one between Colombia and Venezuela, and one could not draw therefrom the conclusion that before these delimitations the states in question had no territory."

States."[34] There is no basis for such a distinction. From the beginning this Court has accorded to Indian treaties the same status as international treaties.[35] Moreover on neither principle or authority is there any reason why the United States in entering into a treaty with an Indian tribe does not recognize its "Indian title", in the same way as it would recognize the sovereignty of another nation and the right of that nation to make disposition of property within its jurisdiction without interference by the United States. *United States* v. *Belmont*, 301 U. S. 324. The fact that the United States holds the ultimate fee operates in no way to preclude recognition by the United States of the full interest the tribe possesses. A somewhat similar situation would exist were Finland to negotiate with Russia at some future date to obtain rights of way and building rights in those ports to which Russia was recently granted a 50-year lease under the treaty with Finland. No one would doubt that Finland in contracting for rights of way or easements would by so doing recognize Russia's 50-year leasehold interest, although such interest was subordinate to its own ultimate right of reverter.

Respondent's error is in assuming that there can be no implied treaty recognition of subordinate title. The contrary has always been recognized. As stated in Cohen in his recent authoritative "Handbook of Federal Indian Law":

> "The idea that land should be acquired from the Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) *that the Indian tribe has a transferable title, of*

---

[34]Brief of the United States in opposition, pp. 17-18.
[35]*The Cherokee Tobacco*, 11 Wall. 616, 621.

> *some sort, to the land in question;* and (3) that the acquisition of Indian lands could not safely be left to individual colonists but must be controlled as a governmental monopoly." (Italics added)

The doctrine that the negotiation of a treaty *ipso facto* constitutes recognition of Indian title has likewise been affirmed by this Court, *United States* v. *Brooks,* 10 How. 442, 459-60. In that case the Caddo Indians by treaty ceded certain lands to the United States, reserving four leagues of land for four white men who had been friends of the tribe. Subsequently the United States brought suit to set aside the conveyance to the four white men on the ground, among others, that the Caddo Indians had never owned such land. In the trial of the case the United States Attorney requested that the jury be instructed that Indians of a tribe *under treaty* with the United States did not hold land by the usual Indian title but were permitted merely to live upon it. The trial court refused the requested instruction and charged instead:

> "That the United States, by treating with the Caddo Indians for the purchase of their lands, recognized in said Indians a right to said lands, similar to the rights to lands generally recognized in Indian tribes with whom the United States have made treaties."

On appeal this was affirmed.

In the present case, there is no need to resort to the bare implication arising from the fact of negotiation of a treaty. The treaties on their face constituted a "recognition" or acknowledgment of petitioners' rights to their lands quite apart from that normal implication—as we now demonstrate:

I.

THE TREATY ON ITS FACE CONSTITUTES A RECOGNITION OF PETITIONERS' TITLE.

The grant and acceptance of rights of way and other easements in petitioners' land constitute an express recognition of petitioners' title thereto.

It should be noted that all five of the Shoshone treaties were negotiated under the same instructions and to accomplish the same purpose. Slight variations in language are thus immaterial. As the court below assumed, all the treaties must be construed together. By the Northwestern Shoshone treaty, which incorporated provisions of the Eastern Shoshone treaty, the petitioner Indians agreed—

1. That "routes of travel through the *Shoshone country* [described by the various treaties], . . . shall be and remain forever free and safe"; and petitioners guarantee "the safety of all travelers passing peaceably over said routes;"[36]

2. That "military agricultural settlements and military posts *may* be established by the President of the United States along said routes; . . .;"[36]

3. That "ferries *may* be maintained over the rivers wherever they may be required. . .;"[36]

4. That "houses [may be] erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers;"[36]

---

[36]Art. II of the Treaty of Ft. Bridger with the Shoshone Nation of Indians represented by the Eastern Bands (R. 40), incorporated and adopted in the Treaty of Box Elder with the Northwestern Bands of Shoshone Indians (R. 43, Art. II).

5. That "telegraph and overland stage lines . . . established and operated *through a part of the Shoshonee country*" would be protected by petitioners;[37]

6. That a railway to the Pacific Ocean "or its branches, *may* be located, constructed, and operated, without molestation from" petitioners *"through any portion of the country claimed by them."*[37]

It cannot be supposed that Indians to whom such provisions were interpreted possibly could have understood that the United States thereby "did not negotiate or agree" (as held by the court below, R. 30) as to their ancient rights in their country. As a matter of law, the granting of these rights by the plaintiff Indians and their acceptance by the United States are consistent only with the view that the United States thereby recognized, acknowledged and confirmed the title or possessory right of use and occupancy by which petitioner Indians held their lands. As stated by the court below in *Fort Berthold Indians* v. *United States* (1930), 71 C. Cls. 308, 332:

> "* * * Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the Indians did not own the same by right of occupancy. * * *"

And as stated by this Court in *Worcester* v. *Georgia*, 6 Pet. 515, 556:

> "By the fifth article [of the Treaty of Hopewell], the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. *The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.*" (Italics added.)

---

[37]Art. III of the Treaty of Ft. Bridger (R. 40-41), incorporated and adopted in the Treaty of Box Elder with petitioners, Art. II (R. 43).

Just so here. To the extent the Northwestern Shoshone Treaty granted rights of way, etc., and permitted travel over the established routes, it brought about a limitation of the free use and occupancy of the lands which the plaintiff Indians had inhabited for many years. It is idle to contend that the United States did not approach the Indians as owners, asking them to concede these privileges, or that the United States did not, through the purchase of such privileges, acknowledge the rightfulness of the Indian claim. Plainly, the treaty was not intended, as the opinion of the court below would render it, to be almost entirely one sided. Petitioners were bound, on their part, to permit the United States to establish routes of travel, establish military posts, maintain ferries, erect houses for the convenience of travelers, and construct a railway in Shoshone territory. In its turn, then, respondent became bound on its part not to go beyond the privileges which, for a small consideration, it had been granted. As stated by *Crandall, Treaties, Their Making and Enforcement* (1916), p. 400, § 171, "The specific enumeration of certain rights with respect to a particular subject matter is a negation of all other analogous rights with respect to the same subject matter. The presumption is that the parties having expressed some, have expressed all, or as stated in the Latin phrase, expressio unius est exclusio alterius."[38] Nor is it

[38]Crandall cites for this, among others, Justice Brewer's opinion in *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, in which Mr. Justice Brewer states, pp. 436-7: " . . . Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. [Citing cases.] . . . The rule is curtly stated in the familiar legal maxim, expressio unius est exclusio alterius."

possible for defendant to accept the benefits of the easements and at the same time deny petitioners' title. As stated in *Herman, Estoppel and Res Judicata* (1886), vol. 2, § 845, p. 974 (quoted with approval and followed by this court in *Chavez* v. *Bergere*, 231 U. S. 482, 491)[39]—

> "If a privity in estate has subsisted between the parties, proof of title is unnecessary; for a party is not allowed to dispute the original title of him by whom he has been let into possesion."

---

[39]*Herman, op. cit.*, also states: "The acceptance of a grant is a conclusive admission of the right of the grantor to convey . . .", giving many illustrations (§ 726, p. 853); "A grantor is estopped to deny the title of a grantee, a mortgagor that of his mortgagee, and a vendee who goes into possession cannot dispute the title of his vendor while he remains in possession" (§ 675, pp. 809-810). The author cites, among other cases, *Willison* v. *Watkins*, 3 Pet. 43, 47-48, where this Court said, "It is an undoubted principle of law, fully recognized by this Court, that a tenant cannot dispute the title of his landlord. . . . The same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title." Herman also refers to a case *Doe dem. Johnson* v. *Baytup* [1835], 3 Ad. & El. [K. B.] 188, 111 Eng. Reprint 384) as to which he states (*op. cit.*, vol. 2, § 844, p. 973) "the defendant asked leave of the party to get vegetables in the garden; having thus obtained an entrance took possession of the house and claimed title; *held*, that she was estopped. The party must first give up possession to the party by whom he was let in, and then, if he or she or anyone claiming by him has a title *aliunde*, that title can be tried by ejectment. This rule applies also to the case of a person coming in by permission, as a lodger or servant, . . ." In the case thus referred to, Lord Denman, C.J., ruled, "She held possession through a license, whether for a longer or shorter time is immaterial. She cannot claim against the party by whom she was let in; that party, as between them, has title." Coleridge, J., ruled to the same effect, holding that "The licensee, by asking permission, admits there is a title in the landlord."

Since in the present case, respondent, through privity of treaty, has acquired and accepted limited servitudes in petitioners' land—rights of way, right to quarter troops, maintain ferries, etc.—respondent is estopped to deny that it thereby recognized petitioners' dominant tenement.

Respondent here is in the position of the camel,[40] who having asked and received permission to put his nose under the tent to keep warm, actually moved the tent's owner out and took it over completely. The court below overlooks that the United States is subject to the doctrine of estoppel arising out of conveyances of land, just as is an individual. See *Menard's Heirs* v. *Massey*, 8 How. 293, 313-314.

Other Judicial Decisions Sustain Position of Petitioners

The decision of the court below in holding that defendant did not by the Box Elder treaty recognize the title of petitioners, is anomolous not only because of its legal reasoning, but more so because, without even trying to distinguish or differentiate, it fails to follow other decisions of the same court which squarely support petitioners' position.

The principal case is *Fort Berthold Indians* v. *United States*, (1930), 71 C. Cls. 308. There, the Arickarees, Gros Ventres, and Mandans Tribes of Indians sued the United States under a jurisdictional act which permitted the Court to determine the amount "due said tribes from the United States under *any treaties*, agreements, or laws of Congress," etc., for the value of lands taken from said tribes in violation of the treaty of September 17, 1851, 5 *Kappler* 1065, signed at Fort Laramie, Wyoming. By the terms of that treaty certain tribes of Indians agreed,

---

[40] *Scudder, The Children's Book* (1910), p. 18.

as in the case at bar, that the United States and its citizens should have the right to establish roads, military and other posts within their country, and secured to the United States and its citizens the right to free passage through the same. Article 5 stipulated that the Indian nations, parties to the treaty, thereby recognized and acknowledged that certain described areas were their respective territories. Although the treaty contained no statement of tribal claim to such land as against the United States, nor any statement of express recognition of this tribal ownership by the United States, the court held that the effect of the treaty was to recognize title and treat the lands described therein as reservations for the Indians, and that the United States was liable for any subsequent taking of the land involved. In so deciding, the court states:

> "* * * The defendant says the territorial provisions were simply mutual recognition by the Indians of their claims to territory and its segregation by them [as between the tribes signing the treaty], without positive governmental recognition or verification of the same. This contention, as we view it, concedes that *when* the commissioners approached the Indians their title by right of occupancy to all the territory embraced within the treaty *was recognized* by the commissioners representing the Government, and that what the treaty did was to segregate the same into individual tribal allotments. In other words, the Government not only recognized the Indian title, *never at any time disputing it*, but by solemn treaty following negotiations, expressly agreed that each tribe was to be assured title to the territory set aside for it. *Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the*

Indians did not own the same by right of occupancy. It is true the lands set aside to each tribe embraced a vast domain. To the plaintiff Indians the treaty segregated territory of about 21,000 square miles and embracing close to 13,000,000 acres of land. With this vast estate, however, the treaty deals, and whether the Government in ratifying the treaty was moved by the then nominal value of somewhat of a wilderness, or concerned in Indian peace at present costs, the fact is that the treaty was ratified in the manner provided by law * * * (p. 332).

* * * * * * *

"The law, for which we need not cite familiar precedents, is that in controversies between the Indians and the Government arising out of doubtful and ambiguous provisions of treaties or contracts they are to be taken most strongly against the Government. The Indians' rights are not to be prejudiced by technical construction or words of doubtful import * * *" (p. 333). (Italics added).

In *Assiniboine Indian Tribe* v. *United States* (1933), 77 C. Cls., 347, 370-371, appeal dismissed and cert. denied, 292 U. S. 606, the plaintiff tribe brought suit under a similar jurisdictional act (permitting determination of claims arising under or growing out of the same Fort Laramie treaty) for lands described in the treaty and which were subsequently taken by the United States. The court again held for plaintiff, although the amount of offsets precluded any net recovery. See also *Crow Nation* v. *United States* (1935), 81 C. Cls. 238, a suit under a similar jurisdictional act for the value of lands claimed under the Treaty of Fort Laramie, where the court below expressly recognized that that treaty "set aside a reservation of some 38 million acres to the Crow Nation" (p. 271).

The Shoshone Treaties of July 2 and July 30, 1863, the ones here sued upon, and the Fort Laramie Treaty of 1851, involved in the *Fort Berthold*, *Assiniboine*, and *Crow* cases, *supra*, were negotiated for precisely the same reasons and to attain the same ends. Abnormal increases in travel and constant trespass over Indian land, had provoked the Indians into the commission of depredations, and in each instance the United States sought by negotiating treaties to pacify them, identify their respective territories, secure the right of free and safe passage through their country, and to compensate them for such easements and for the extinction of game. Moreover, the treaties, in substance, carry the same reciprocal obligations and recognitions. Nevertheless, the Court of Claims under substantially identical jurisdictional acts, allowed recovery for taking the lands in the three cited cases, but denied recovery in the case at bar. There is no sound distinction between these cases.

Indeed this Court—as well as the court below—on the two occasions it had occasion to look at the Eastern Shoshone treaty (Treaty of Ft. Bridger, July 2, 1863, 18 Stat. 685, R. 40) read it as one creating a reservation for that division of the Shoshone Nation. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485, reversing 82 C. Cls. 23, 26; same case, 304 U. S. 111, 113, affirming 85 C. Cls. 331, 335.[41] While the question was not, in that case,

[41] In that case the Eastern Shoshones sued, not under the Eastern Shoshone Treaty of July 2, 1863 (R. 40), but under a subsequent treaty signed July 3, 1868, 15 Stat. 673. Under the latter treaty they had relinquished the lands described in the earlier Eastern Shoshone treaty in exchange for other lands. The suit was to recover from the United States for having put another Tribe of Indians on part of the substituted lands for which recovery

before this Court as now presented, it is significant that as opposed to the narrow reading of the treaty indulged below, this Court read the treaty as one which acknowledged the territorial rights of the Indians.

The Indian title recognized by the Fort Laramie treaty was again upheld in *United States* v. *Northern Pac. R. Co.*, 311 U. S. 317. There the United States had by act of Congress conveyed to the railway company all lands as to which the United States "have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed," and had also agreed to "extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian title to all land falling under the operation of this act." This Court held that the United States, as between itself and the railway company,

---

was allowed. Both the Court of Claims and this Court, however, examined the effect of the original Eastern Shoshone Treaty. The Court of Claims in each of its two decisions made the following special findings of fact:

"1. On July 2, 1863, plaintiff tribe of Indians and the United States entered into a treaty, 18 Stat. 685, which set apart for plaintiff a reservation * * *." "2. By the Treaty of July 3, 1868, 15 Stat. 673, plaintiff gave up and relinquished this reservation to the United States and accepted in lieu thereof the present reservation * * *". The first opinion of this Court which, for reasons here unimportant, remanded the cause to the Court of Claims, stated: "By treaty of July 3, 1868 (15 Stat. 673), the Shoshone Tribe of Indians relinquished to the United States a reservation * * * and accepted in exchange a reservation * * * with other benefits not now important." To the same effect was the language of this Court when it handed down its second opinion affirming the judgment of the Court of Claims: "The findings show: The United States, by the treaty of July 2, 1863, set apart for the Shoshone Tribe a reservation * * *. By the treaty of July 3, 1868, the tribe ceded that reservation to the United States."

could not deny it was intended that the railway company obtain the Indian lands; that as between the railway company and the United States the lands were not "reserved" by the United States within the meaning of the limitation on the granting clause. In so holding, the Court stated, it is true, that the Treaty of Fort Laramie "did not create technical reservations" in that it did not contain the "usual provisions for an Indian Agent for schools, assistance in farming operations, etc." But the Court, on the other hand, did not depart from the established doctrine upon which petitioners rely, namely, that while the railway company secured the land under the terms of the grant, the Indians who had been recognized by the Fort Laramie Treaty still had title thereto, which had to be extinguished by the United States under its statutory duty to the railway company. For in the concluding paragraph of the opinion on this question the Court says that "This Court has repeatedly passed upon the question; has held the lands were Indian country, subject only to the Indians right of occupancy; . . . and that . . . the United States assumed the obligation of extinguishing the Indian title in favor of the Company." The *Northern Pacific* case did not involve a controversy between any Indian tribe and the United States, but merely turned upon whether by the terms of the grant to the railway company the United States intended to transfer lands in which the Indians had a recognized possessory right of use and occupancy.

In the determination of a contest between the United States and an Indian tribe for the taking of the Indian title, it is, of course, unimportant whether the treaty under which the Indians claim established "technical reservations" with Indian agents in charge, etc., as referred to by this Court

in the *Northern Pacific* case, or recognized the existing Indian title. For as stated by this Court in an analogous situation (*Minnesota* v. *Hitchcock*, 185 U. S. 373, 388-9):

> "Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

The fact that in the *Northern Pacific* case both the railway and the Indians were entitled to the lands under their respective agreements with the United States would not mean that if the railway recovered the lands, the Indians would not be entitled to recover for their loss, as in the *Fort Berthold* case, above. Cf. *Menominee Tribe of Indians* v. *United States* (1941), 95 C. Cls. 232, where the United States, having agreed to convey to the Menominee Indians certain lands which it had already conveyed to Wisconsin, was held liable at the suit of the Indians for the value of such land. In so holding, the Court of Claims distinguished *United States* v. *Minnesota*, 270 U. S. 181, which, like the *Northern Pacific* case, involved not a contest between the United States and an Indian tribe whose

title had been recognized, but a contest between the United States and one of its grantees. Although in the *Menominee* case the respondent had an absolute right of appeal, it acquiesced in the decision and subsequently stipulated as to the amount of damages.

The Senate Amendment is Conclusive on Question of Recognition.

The Senate, in ratifying the treaty made plain that it understood the treaty operated to recognize petitioner's title. With all of the Shoshone treaties and the Doty map before it, the Senate added an amendment to each of the treaties (except the treaty with the Western Shoshones, which was not ratified until much later than the other four, R. 72) providing:

> "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof" (R. 57).

The Court below held that the primary purpose and scope of the treaty was that of peace and amity (R. 56); that without the Senate amendment the treaty did not admit or deny Indian title, and that the amendment added nothing to the treaty in this respect (R. 74). This holding does violence to the interpretation Congress ascribed to the treaties. If, as insisted by the court below, they were merely treaties of peace and amity, and no more, there would have been no need whatever for the Senate amendment. By inserting such a provision restricting and qualifying the effect of the treaty as far as recognition of title to the lands

derived from Mexico was concerned, the Senate clearly indicated it understood the treaty accorded recognition of petitioners' title at least to the lands which lay outside of the Mexican cession. There was no need for any exception if the treaty recognized no rights; and the imposition of such a limitation as was adopted, under the rule *expressio unius est exclusio alterius,* demonstrates that the Senate was imposing no limitation on land other than that within the Mexican cession. *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, 22; *Arthur* v. *Cumming,* 91 U. S. 362; *Sturges* v. *The Collector,* 12 Wall. 19, 27.[42]

And even as respects the Mexican lands, the amendment itself is an express recognition of such title as existed in petitioners under Mexican law. To hold that the Senate amendment added nothing is to attribute to the Senate a wholly futile, useless and meaningless act, which will not be presumed. *Mid-Northern Oil Co.* v. *Walker,* 268 U. S. 45, 48; *Geofroy* v. *Riggs,* 133 U. S. 258, 269-270; *Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Wheaton* v. *Peters,* 8 Pet. 591, 661; *Galloway* v. *Finley,* 12 Pet. 264, 298.

Thus, in the *Mid-Northern Oil Co.,* case, Mr. Justice Sutherland stated:

> "It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law [in this case an amendment] to save

---

[42]In *Sturges* v. *The Collector,* the Supreme Court, in discussing a Revenue Act, stated:

> "Raw cotton and raw silk * * * were exempted from the new duty * * * by an exemption inserted in the body of the section and it is reasonable to assume that if Congress had intended to exempt any other article * * * the article would have been enumerated and included in that exception."

> rights which, being in no way challenged or affected, stood in no need of being saved."

The ruling of the court below that the amendment "added nothing to the treaty" reduces the amendment to *brutem fulmen*, and contravenes the long-established rule announced by Mr. Justice Field in *Geofroy* v. *Riggs, supra*:

> "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. 'The interpretation, therefore', says Vattel, 'which would render a treaty null and inefficient, cannot be admitted'; and again, 'it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory.' Vattel Bk. 2, c. 17."

Subsequent to the time this case was submitted but before it was decided below, this Court, following its earlier pronouncements, expressly held that "it has been the policy of the Federal Government from the beginning to respect the Indians right of occupancy" (Indian title) and "that lands within the Mexican cession were not excepted from" this policy.[43] *United States as Guardian, etc.* v. *Santa Fe*

---

[43]Although the court below admitted that under this Court's decision petitioner bands had Indian title to the lands in the Mexican cession, as well as elsewhere (R. 64), the court seemed confused in its thinking for elsewhere in its opinion (R. 71) it refers to the Senate's refusal in 1852 to ratify 18 treaties with the Indians of California, because it did not want to recognize "any possessory use or occupancy right, title or interest" of the Indians of California to land in California which also came from Mexico, and concludes that the "Executive Department and the Senate had that policy or attitude in mind in 1863 and 1864 when the treaty with plaintiff bands of the Shoshone Indians was negotiated, made, and ratified with the" amendment here considered. We do not understand how it is possible to hold that because

Pacific Railroad Co., supra, p. 345, see also R. 65. The question of law, which was reserved by the Senate in its amendment to the treaty, having been thus resolved, it is clear that the Indian title recognized by the treaty applied to all the lands encompassed by petitioners' treaty.

The phrase "Country Claimed" in petitioners' treaty was used as the equivalent of title.

The court below in arriving at its interpretation of petitioners' treaty, placed its main reliance on the fact that the draftsman of petitioners' treaty described petitioners' land merely as "The Country *claimed* for Pokatello for himself and his people", etc. The Court seized upon the phrase "country claimed" (R. 73-4) and attributed its use to a mere desire on the part of respondent "to obtain as much information as possible as to what territory the Indians *claimed*, because the Government had no information in that regard from the Indians themselves, and very indefinite information otherwise as to the territory which they occupied" (R. 74). (Italics are by the court.) The court thus placed upon the word "claimed" the connotation that it was merely the unrecognized assertion or pretention of a right.

No such reason would normally prompt setting out, in language of the kind chosen, the mere assertion of the Indians. A desire to obtain information as to country occupied could have been fulfilled by calling on Superintendent Doty and other government officials for reports.

---

the Senate, in order not to recognize Indian title to land in California, refused to ratify the California treaties, it follows that the Shoshone treaties which were ratified, must be construed as carrying out the same policy of non-recognition. The reverse must be true.

Language in some of the Shoshone treaties is too plain to admit of the construction that the United States was merely ascertaining the demands and pretentions of the Shoshones; for the series of five treaties used the language that it was "*understood* the boundaries of the Shoshone country, as defined and described by said nation" were as therein delineated;[44] and that the land described was "*understood*" to be the "boundaries of the country *claimed and occupied*".[45] This is not the language of mere pretension of a right. And yet, the five treaties, in lieu of one treaty, having been negotiated under one set of instructions and to accomplish identical purposes, it is most unlikely that language would be chosen advertently to admit or acknowledge the Indian title of certain divisions of the Shoshone Nation and yet not do so as to the other divisions of the same nation. And as previously pointed out (pp. 40-41) the Eastern Shoshone treaty has already been read by both the court below and this Court to recognize the title of the Eastern Shoshone Division.

The language in the treaty of the Mixed Bands (R. 50-51, Art. IV) and in that of petitioners, which is "country claimed" must be interpreted the same as the above language in the other treaties. Viewed in its historical setting, the object of the use of the phrase, "country claimed" was agreement on the terirtorial rights of the Shoshones. The commissioners were instructed to secure from petitioners in their treaty "a definite acknowledgment * * * of the boundaries of the entire country they claim, as of the limits within which they will confine themselves * * *."

---

[44]Eastern Shoshone Treaty, Art. IV, R. 41.

[45]Western Shoshone Treaty, Art. V, R. 46; Shoshonee-Goship Treaty, Art. V, R. 48-49.

In the days of the frontier the word "claim" as between whites who could read and write and entirely apart from Indian title was often used as the equivalent of *title* or *right*. In *Southern Pac. R. Co.* v. *United States* (N. D. Cal., 1889), 38 Fed. 55, 56, Judge Sawyer stated, "The word, 'claim', is very broad and comprehensive in its signification—quite as comprehensive as any of its synonyms —demand, pretension, right, privilege, title." The Supreme Court of California interpreted the phrase "claim to" possession of land in a revenue act, which spoke apparently disjunctively of "ownership of or claim to or possession of," land, as involving more than the mere assertion of a right in the land. *People* v. *Frisbie* (1866), 31 Cal. 146, 148. The Supreme Court of South Dakota held that the word "claim" when used in relation to real property was generally used in the broader sense of "title" or "ownership". *Sherman* v. *Sherman* (1909), 23 S. D. 486, 494-5, 122 N. W. 439, 443. When the public domain of the west was being opened, an entry was known as a "claim"; and when perfected, though officially designated a "patent", colloquially it was not so restricted. In mining law, the word "claim" was generally used as meaning "title". As stated in *Northern Pac. R. Co.* v. *Sanders* (C. C. A. 9th, 1892), 49 Fed. 129, 135:

> "Just here seems to be a good place to remark that, in the common parlance of the mining districts, the word 'claim', used as a noun, has a definite and particular meaning, denoting, when coupled with the name of miner, a particular piece of ground to which that miner had a recognized vested and exclusive right of possession for the purpose of extracting precious metals therefrom, . . ."

This Court has recognized that it was used synonymously with the word "location" to denote rights in mineral land. *Del Monte Min. & Mil. Co.*, v. *Last Chance Min. & Mil. Co.*, 171 U. S. 55, 74, and *passim*, quoting many acts of Congress.

In Indian land matters, the word "claim" has taken on an equal or even broader connotation. It has there become a word of art. In its various inflections and tenses it has come to mean none other than Indian title. This Court has so regarded it in a number of cases.[46]

The treaty making branch of respondent has consistently used the word "claim" as synonymous with "title". In scores of treaties made with Indian tribes it has been used to denominate the peculiar property of Indian tribes in their land as the phrase "miner's claim" has been used to denote the property interest of a miner, or as the word "fee" has been used to denominate property of the whites. Thus, where the United States has ceded its own lands to the Indians—in one instance conveying the lands "in fee

---

[46]In *Nadeau* v. *Union Pac. R. Co.*, 253 U. S. 444, 446, this Court appositively defined the word "claim" as follows: " . . . the lands were but part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States." In *Clark* v. *Smith*, 13 Pet. 195, 200-201, the Court spoke of "the claim of the Chickashaw Indians" to their country, prior to its extinguishment, in a sense which indicated that it meant the Indian title; and the Court, in reviewing that case in *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55, mentioned that the objection that a patent was void because issued for lands "within a country claimed by Indians" had been rejected notwithstanding the Indian title was respected, quoting the *Clark* case for the proposition that "This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee." See also p. 70, where the Court again uses "Indian claim" as synonymous with "Indian title."

simple"[47]—the title, when reconveyed to the United States by the Indians, was denominated merely as a "claim" to the lands.[48] That it means more than an "interest" in land, is evident from the contrasting use of these words in a cession by the Sac and Fox Indians to the United States, of "all lands * * * to which they have *any claim*, or title, or in which they have *any interest whatever*."[49] That it means more than a mere pretension or assertion of a claim is shown by a treaty where the Indians cede the lands they "claim" and in addition those to which they "pretend to have any claim."[50] That it means actual Indian ownership is shown by treaties in which the Indians ceded lands "occupied and claimed by them," retaining the right to reside on ground in the ceded area "not in the actual claim and occupation of citizens of the United States; and

---

[47]Treaty with the Choctaws, September 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2.

[48]Treaty with the Peorias, Sept. 25, 1818, 7 Stat. 181, 2 Kappler 165, Art. 5, ceding lands to the Peorias, with which compare Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3, in which the Peorias "cede and relinquish to the United States, *all their claims* to land heretofore reserved by, or assigned to them in former treaties * * *."

Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2, conveying to the Choctaws "in fee simple" certain country west of the Mississippi, with which compare Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706 (preamble, par. 2), wherein the Choctaws relinquished *"all claim"* to a part of the territory.

See also Treaty with the Creeks, Jan. 24, 1826, 7 Stat. 286, 2 Kappler 264, Art. 1, and treaty referred to therein.

[49]Treaty with Sac and Fox, October 11, 1842, 7 Stat. 596, 2 Kappler 546, Art. 1.

[50]Treaty with the Otoe and Missouri, Sept. 21, 1833, 7 Stat. 429, 2 Kappler 400, Art. 1, in which the language was a cession of lands south of a line "running in a due west line as far west, as said Otoes and Missourias, *have*, or *pretend to have any claim.*"

upon any ground claimed or occupied, if with the permission of the owner or claimant"[51]—the ownership of the whites thus being described in words the exact equivalent of those used to describe the title of the Indians.

The Indians frequently have ceded their lands in terms of "all their claim";[52] "all claim whatever";[53] "all claim";[54] and "claim of any kind whatsoever."[55] It has been expressed that the Indians were receiving payment for "country claimed by them";[56] or that particular boundaries encompassed land "claimed by them";[57] or that the cession was of "all their claim to land"[58] or of "all claim" to certain territory;[59] or that they were conveying "all the country claimed by them."[60]

---

[51]Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Arts. 1 and 2. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Arts. 1 and 2.

[52]Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278, Art. 1. Treaty with Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler, 376, Art. 3.

[53]Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327, 2 Kappler 304.

[54]Treaty with the Seminoles, May 9, 1832, 7 Stat. 368, 2 Kappler 344, Art. 1. Treaty with the Seneca, Nov. 5, 1857, 11 Stat. 735, 12 Stat. 991, 2 Kappler 767, Art. 1.

[55]Treaty with the Potawatomi, June 5 and 17, 1846. 9 Stat. 853, 2 Kappler 557.

[56]Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[57]Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1.

[58]Treaty with the Delawares, Oct. 3, 1818, 7 Stat. 188, 2 Kappler 170.

[59]Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706, preamble.

[60]Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1. Treaty with the Tribes of Middle Oregon, *supra* note 56.

Thus, too, the cession has been of the lands "claimed and owned,"[61] "owned and claimed,"[62] or "owned or claimed."[63] Sometimes it has been expressed as a cession of lands and country "occupied and claimed,"[64] *or* "occupied or claimed."[65] Some treaties recognized, as to Indians not parties to the treaty, that they might have title to some of the lands ceded, by providing that if such bands "residing in and claiming" any portion of the country ceded should not become parties to the treaty, then the consideration should be proportionately adjusted in accordance with the whole number of Indians "residing in and claiming the entire country."[66] The lands are spoken of as being "owned, claimed *or* possessed,"[67] "owned, possessed, or claimed,"[68] or "claimed, held, or possessed."[69]

---

[61]Treaty with the Wea, Oct. 2, 1818, 7 Stat. 186, 2 Kappler 169, Art. 1.

[62]Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, 2 Kappler 685, Art. 1; Treaty with the Chippewa, Red Lake and Pembina Bands, Oct. 2, 1863, 13 Stat. 667, 2 Kappler 853, Art. 2.

[63]Treaty with the Pawnee, Sept. 24, 1857, 11 Stat. 729, 2 Kappler 764, Art. 1; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699, 2 Kappler 756, Art. 5; Treaty with the Ponca, Mar. 12, 1858, 12 Stat. 997, 2 Kappler 772, Art. 1.

[64]Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 1.

[65]Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 1; Treaty with the Flatheads, July 16, 1855, 12 Stat. 975, 2 Kappler 722, Art. 1.

[66]Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Arts. 1 and 2; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[67]Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, 2 Kappler 439, Art. 1.

[68]Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, 2 Kappler 776, Art. 1; Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, 12 Stat. 1163, 2 Kappler 807, Art. 1.

[69]Treaty with the Chippewa, Bois Fort Band, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

The words of grant themselves have not been limited to the traditional "right, title and interest" of the draftsman of deeds. Thus, the cession has been expressed to be of "all their title and claim,"[70] or "title or claim,"[71] of "all claim or title,"[72] or "all interest or claim,"[73] or "all their right, claim, and title,"[74] or "all their claim, interest and title,"[75] or "all their right, title and claim,"[76] or "all right,

---

[70]Treaty with the Choctaw, Oct. 24, 1816, 7 Stat. 152, 2 Kappler 137, Art. 1.

[71]Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237, 2 Kappler 214, Art. 1; Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 2 Kappler 222, Art. 1; Treaty with the Winnebago, Sept. 15, 1832, 7 Stat. 370, 2 Kappler 345, Art. 1; Treaty with the Sac and Fox, Sept. 21, 1832, 7 Stat. 374, 2 Kappler 349, Art. 1.

[72]Treaty with the Chickasaw, Oct. 19, 1818, 7 Stat. 192, 2 Kappler 174, Art. 2; Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224, 2 Kappler 203, Art. 1; Treaty with the Quapaw, Nov. 15, 1824, 7 Stat. 232, 2 Kappler 210, Art. 1.

[73]Treaty with the Iowa, Oct. 19, 1838, 7 Stat. 568, 2 Kappler 518, Art. 1, § 1 (see § 2).

[74]Treaty with the Ottawa, Aug. 24, 1816, 7 Stat. 146, 2 Kappler 132, Art. 1.

[75]Treaty with the Shawnee, Nov. 7, 1825, 7 Stat. 284, 2 Kappler 262, Art. 1.

[76]Treaty with the Miami, Feb. 11, 1828, 7 Stat. 309, 2 Kappler 286, Art. 1; Treaty with the Winnebago, Aug. 1, 1829, 7 Stat. 323, 2 Kappler 300, Art. 1; Treaty with the Sioux, Aug. 5, 1851, 10 Stat. 954, 2 Kappler 591, Art. 2; Treaty with the Kalapuya, Jan. 22, 1855, 10 Stat. 1143, 2 Kappler 665, Art. 1; Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Art. 1; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1; Treaty with the Klamath, October 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1; Treaty with the Chippewa, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

title, interest and claim,"[77] or "all of their claims, right, title, and interest,"[78] or "all their right, title, interest, claim, and privilege."[79]

Uniformly in Indian treaties, by use of the word "claim," the parties have understood that the Indians conveyed something more than the release of a mere assertion of some undefined interest; for in such cases, the treaties speak of the "land herein conveyed." And despite the fact that a "claim" to land was conveyed to the United States, the Indians nevertheless frequently made reservations in the treaty of conveyance, where they were retaining some part of their old lands (instead of removing to new ones).[80] In such a situation we know of only one case in which respondent has ever made the objection that the reservation retained was not in fact owned. In that case (*United States* v. *Brooks*, 10 How. 442) respondents' objection was overruled (See p. 32 *ante*). Indeed apart from the

---

[77]Treaty with the Iowa, Aug. 4, 1824, 7 Stat. 231, 2 Kappler 208, Art. 1; Treaty with the Osage, June 2, 1825, 7 Stat. 240, 2 Kappler 217, Art. 1; Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871, 2 Kappler 561, Art. 4; Treaty with the Umpqua, Sept. 19, 1853, 10 Stat. 1027, 2 Kappler 606, Art. 1; Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art 1; Treaty with the Rogue River Tribe, Sept. 10, 1853, 10 Stat. 1018, 2 Kappler 603, Art 1.

[78]Treaty with the Utah-Tabequache Band, Oct. 7, 1863, 13 Stat. 673, 2 Kappler 856, Art. 2, which as this Court said "must be viewed as giving the band a country—limited by reservation boundaries—never before possessed by this band." *Hayt* v. *United States* (1903), 38 C. Cls. 455, 464.

[79]Treaty with the Winnebago, Oct. 13, 1846, 9 Stat. 878, 2 Kappler 565, Art. 2.

[80]See *e.g.*, Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278; Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 2; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 2.

Brooks case, *supra*, the present case, so far as counsel for petitioners have been able to determine, is the first case, in any situation, where it has been contended or held that the word "claim" in an Indian treaty does not connote the Indian right of use and occupancy.

Treaty Provisions Construed to Enlarge, Not Diminish Rights Claimed Under It.

Assuming arguendo that the Box Elder treaty could be construed either as a recognition or non-recognition of petitioners' title, the traditional view of this Court is that it should be so construed as to uphold and enlarge rather than destroy and diminish petitioners' property rights. The peculiar canon of construction applied to treaties was stated by Stone, J. in *Nielson* v. *Johnson*, 279 U. S. 47, 52 as follows:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, * * *."

To the same effect are the decisions in *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-4; *Asakura* v. *City of Seattle*, 265 U. S. 332, 342.

American statesmen and jurists have generally taken the view that once we accept a treaty, we are too self-respecting a nation to construe it narrowly because we have the power to enforce our decisions. Thus, President Wilson in requesting the repeal of the law exempting coastwise American ships from Panama Canal tolls as contrary to a treaty with Great Britain said:

> ". . . We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please . . ." (51 *Cong. Rec.* 4346).

Senator Elihu Root in debate on the Hay-Pauncefote treaty on May 21, 1914, gave voice to the same theory:

> ". . . Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promisor is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made." (51 *Cong. Rec.* 8945).

As applied to the instant case, this rule of construction requires that the Box Elder treaty be construed so as to require recognition of petitioners' title.

The same interpretation results also from the fact the petitioners were Indian who could neither read nor write as well as the fact that the treaty was drafted by respondent's agents. In such a situation all doubt must be resolved against respondent.[81]

---

[81] As stated by Crandall: "If the ambiguous words are those of one party only, as might be the case in an agreement recorded by an exchange of notes or counter-declarations, or in the counterpart of its own language, they are to be construed against rather than in favor of the party using them. It was a maxim of early Roman law that an agreement obscurely expressed or of doubtful meaning was to be interpreted against the person who had it in his power to set down the terms more clearly. So far as a treaty comes before a domestic court of one of the contracting parties

Treaties with Indian Tribes Should Never Be Construed to Their Prejudice.

It is undoubtedly because of these considerations that the invariable rule of this Court has been that in construing treaties with an Indian tribe, all doubts must be resolved in their favor. *Worcester* v. *Georgia*, 6 Pet. 515, 551, 552, 582. To the same effect, *Kansas Indians*, 5 Wall. 737, 750; *Jones* v. *Meehan*, 175 U. S. 1, 10-12; *United States* v. *Winans*, 198 U. S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, 198; *Marlin* v. *Lewallen*, 276 U. S. 58, 64; *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 366-367; *United States* v. *Payne*, 264 U. S. 446, 448-449; *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, 116. The rule is stated in *Jones* v. *Meehan, supra*, as follows:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms

---

as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations." *Op. cit.*, note 32 *ante*, § 171, pp. 400-401; and see the quotation from *Jones* v. *Meehan*, 175 U. S. 1, 10-12, on next page of this brief.

of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. In the case of *Worcester* v. *Georgia*, (1832) Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States,' (7 Stat. 19,) said: 'There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' 'Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out".' 6 Pet. 551, 552. And Mr. Justice McLean, concurring said: 'The language used in treaties with the Indians should never be construed to their prejudice.' 'To contend that the word "allotted", in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

This rule was recently reiterated in *United States* v. *Shoshone Tribe of Indians, supra,* in which Mr. Justice Cardozo writing for the Court ruled that treaties with Indian tribes are to be read not "narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them."

The territory recognized was the land set forth in petitioners' treaty as supplemented by the territorial descriptions of the other treaties.

The court below, because it held there was no recognition, was not required in its findings to set forth boundaries of the land which the treaty recognized. In its opinion, however, it stated that petitioners were not entitled to recover as for a taking, because respondent "did not, by the treaty, set aside any specific area for the exclusive use and occupancy by plaintiffs, and did not, by the treaty, recognize or acknowledge any exclusive use and occupancy right and title of the Indians to the whole or any portion of the acreage here claimed" (R. 75). In its context we interpret the first of these reasons to mean merely that respondent did not "set aside" a technical reservation with Indian agents, etc. for petitioners. Since we make no contrary contention the first reason assigned by the court is not in issue. This reduces the case to the second reason above assigned as to which this brief has been devoted. And since we have already shown that recognition of petitioners' rights in their lands was accorded by the Shoshone treaties, there remains only the question as to what lands were so recognized.

There should be no question that the land so acknowledged as that of petitioners is the land defined and described

by the territorial description of the treaty of Box Elder as supplemented by the territorial descriptions in the other Shoshone treaties. Taken together these descriptions set up the exterior boundaries of the land belonging to the entire Shoshone Nation and the parts belonging to each of the other four divisions leaving the balance within the exterior boundaries as belonging to the Northwestern Shoshones. This interpretation is corroborated by the Doty Map, which accompanied the treaties to the Senate and which is set forth in the findings of the court below (R. 55), as also by the map which the General Land Office prepared in 1939 based on the treaty provisions and recent surveys to show the areas recognized as being reserved by the different divisions of the Shoshone Nation (R. 74; Plf's Ex. 5 sent up to this Court with the record).

The reason Governor Doty, who drafted the treaties, did not include in the Northwestern Shoshone treaty a complete description of all of petitioners' lands but only that "claimed by Pokatello [one of petitioner chiefs] for himself and his people,"[82] is that he did not at that time

---

[82]One reason why Governor Doty did insert the description of Pokatello's land, even though he could not then define all of Northwestern Shoshone territory, was that the junctions of important overland routes of travel and the roads to the gold mines in Idaho and Montana were located in the particular area occupied by Pocatello's band. While the overland routes passed through the area occupied by the other Northwestern Shoshones west of Raft River, many important crossroads were in the territory claimed by Pocatello's band as their native habitat. When he and his band joined with the other Northwestern Shoshone bands and their respective chiefs, it was a matter of major concern to fix the responsibility of Pocatello and his band for any depredations thereafter committed by the Indians in this particular territory; for Pokatello was one of the most warlike of the Shoshone chiefs. R. 51-54.

know the exact extent of country owned by all the Northwestern Shoshones. He had, however, already concluded the treaty with the Eastern Shoshones, which left the western boundaries of their lands undefined because there were no Shoshones from that part of country present. When he came to negotiate with the Northwestern Shoshones, he determined that Pokatello's band occupied the land directly west of the Eastern Shoshones. So he included in the Northwestern Shoshone treaties a description of the eastern boundary of Pocatello's land and inserted a provision whereby the boundaries set forth in the Eastern Shoshone treaty were confirmed. This had the effect of defining and closing the western boundary of the Eastern Shoshonees. Later on when he negotiated with the Shoshonee-Goships on the south, the Western Shoshones on the southwest and the Mixed Bands on the north, he determined the boundaries existing between them and the Northwestern Shoshones. There is of course no doubt that the documents here in question were contemporaneous, related instruments, in *pari materia* and should be considered and construed together.[83]

---

[83]It has long been recognized that "all acts in *pari materia* are to be taken together as if they were one law." *United States* v. *Freeman*, 3 How. 556, 564, 565; *Bailey* v. *R. R. Co.*, 17 Wall. 96, 105-108; *United States* v. *Stewart*, 311 U. S. 60, 64. Nor is it necessary that the instruments should in terms refer to each other if in point of fact they are related instruments. *People* v. *Cowan*, (1918) 283 Ill. 308, 315, 316, 119 N. E. 335; *Bailey* v. *R. R. Co.*, *supra*. This is particularly true where they relate to the same subject, or to the same class of persons, or have a common purpose, for they are in *pari materia*. See *United States* v. *Stewart*, *supra*; *Richardson* v. *Harmon*, 222 U. S. 96, and *Chott* v. *Ewing*, 237 U. S. 197. Indeed, it has been held that where two statutes are in *pari materia* and one contains provisions omitted from the other, the omitted provisions will be applied in a proceeding

It therefor is immaterial that the entire description of Northwestern Shoshone country is not contained in the Box Elder Treaty, but is taken from all the treaties together and the contemporary map of the Commissioner on the part of the United States. In *Spalding* v. *Chandler*, 160 U. S. 394, this Court held that a valid reservation was created by a treaty which provided that certain Indians should have a perpetual place of encampment, but failed to describe the area reserved, which area remained undefined until a survey twenty-five years later delineated its boundaries. In that case the Court said:

> "But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian Reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. * * * If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. * * *" (pp. 403-404.)

In *Schulenberg* v. *Harriman*, 21 Wall. 44, 60, it was held that a governmental grant of land which did not de-

---

under the act not containing such provisions. *Ketcham* v. *Board of Education*, (1927) 324 Ill. 314, 317, 155 N. E. 332; *People* v. *Cowan*, *supra*. The reason is that unless they are construed together the legislative program may not be completely and accurately carried out. These principles, applicable alike in the construction of contracts and statutes, are applied to the construction and interpretation of treaties. *Sullivan* v. *Kidd*, 254 U. S. 433, 439; *United States* v. *Choctaw Nation*, 179 U. S. 494, 531; *Hamilton* v. *Erie R. R. Co.* (1916), 219 N. Y. 343, 353, 114 N. E. 398 (Error dism. 248 U. S. 369).

scribe boundaries operated as a present transfer of title although subsequent proceedings were necessary to determine the land, title to which was passed. See also *Fremont* v. *United States*, 17 How. 542, 558-9. Likewise, a treaty can establish rights to territory even though a description of boundaries is omitted. *Wilson* v. *Shaw*, 204 U. S. 24. In that case it was contended that the United States was without power to construct the Panama Canal because its treaty with Panama was deficient in several respects—one being that the boundaries of the Panama Canal Zone were not set forth in the treaty. This Court held:

> ". . . It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.
>
> "Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possessions east was not settled until within the last two or three years. Yet no one ever doubted the title of this Republic to Alaska."

Here, of course, the boundaries of petitioners' land are identified by the provisions of the various treaties taken together. In such case, the courts have no right, irrespec-

tive of whether petitioners previously occupied the land in question, to ignore, amend or change these boundaries. *United States* v. *Brooks*, 10 How. 442; *Omaha Tribe of Indians* v. *United States*, 53 C. Cls. 549. In the *Brooks* case Caddo Indians by treaty with the United States reserved certain land for third parties, represented as being their friends. Subsequently, the United States sued to recover the reserved land on the ground that it was not at the time of the treaty occupied and possessed by the Caddo Tribe. The Court, however, refused to look beyond the language of the treaty and denied relief. In the *Omaha* case, the Indians, by treaty, ceded certain described land to the United States, reserving certain described land for themselves. Subsequently, the United States having taken the land reserved, the Indians sued for its value. The United States defended on the ground that the Indians "never owned" the land which they had ceded or reserved, and consequently "never had the right to cede the land to" the United States (p. 560). This defense was summarily rejected by the court which held that the boundaries stated in the treaty were conclusive. The court remarked that those making the treaty for the United States:

> "knew what the Omahas claimed; they knew that their possession and occupation of this land was considered with reference to their habits and modes of life; that the Indians had a right to the exclusive enjoyment of it in their own way until they abandoned the land or ceded it to the Government; their right of occupancy was considered as firmly established—this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it."

II

EXTERNAL AIDS TO CONSTRUCTION CONFIRM PETITIONERS' INTERPRETATION OF TREATY

A. Matters Leading up to Negotiation of the Treaties

As opposed to the holding of the court below that the United States by negotiating and entering into the Shoshone treaties did not recognize or acknowledge the Indian title of petitioners (R. 55-56, 65-66) even the history of events preceding their negotiation points in the direction of recognition.

As set forth in the statement of facts (*ante*, pp. 7-8) all of respondent's administrative officials concerned with the Shoshones (the local agent, the Superintendent of Indian Affairs for the territory of Utah, who had charge of Shoshone matters, and the Commissioner of Indian Affairs) recommended that treaties be entered into with Shoshones for the purpose of extinguishing their right of occupancy or "Indian title." Congress followed the recommendation to have a treaty negotiated but refused to follow the recommendation to extinguish the Indian title. Instead of purchasing the Shoshone country, it was decided to purchase rights of way over this country and pay a small amount for the driving away of buffalo and other game upon which the Shoshones existed.[84] By this method of approach, it was deliberately decided that the treaty to be negotiated should recognize the Indian title of the Shoshones to the lands claimed by them. This is plainly shown by the legislative history of the resolution authorizing the

---

[84]Art. V of Eastern Shoshone treaty (R. 41) incorporated in northwestern Shoshone treaty by Art. II (R. 43).

treaty. The House Committee which reported on the resolution to "inquire into the expediency of making an appropriation to defray the expenses of making treaties in Utah," recommended an appropriation of only $20,000, which did not contemplate the purchase of the Shoshone land, but as explained by Senator Nesmith of Oregon was for "the purpose of quieting them and maintaining peace between them and the large population of miners who are now occupying a portion of *their country*, as well as *emigrants who are crossing the plains.*" (See note 19, *ante* p. 8.)

This maintenance of peace was to be accomplished by the peaceful purchase, at small cost, of rights of way over Shoshone land. Consequently, upon Congress authorizing the appointment of the treaty Commissioners (Act of July 5, 1862, 12 Stat. 512, 529) the Commissioner of Indian Affairs instructed the Commissioners that it was understood the Shoshones inhabited "the country in the northern part of Utah and eastern portion of Washington territories, through which lie the route of the overland mail, and the emigrant route through Utah and into Washington territory and it is mainly to secure the safety of the *travel along these routes* that a treaty is desirable." They were told that it was—

> "*not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land*, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you *will be enabled to procure from them such*

articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

Thus the plan to pay for rights of way carried with it an intent to recognize the title of petitioners to the land underlying such rights of way. The fallacy of the opinion of the court below lies in the assumptions that a treaty of peace and amity has nothing to do with a recognition of title and that Congress in providing for the acquisition of rights-of-way, and the Executive in negotiating the treaties, never intended to recognize the underlying title of those who were to grant the right-of-way. The only way that could have been done was by affirmatively providing that the acceptance of the desired rights-of-way did not constitute an acknowledgment of the underlying title.[84a] This was not done. The contrary argument—that in the absence of specific instructions affirmatively to recognize petitioners' title, it must be assumed there was no such recognition, —would place respondent in the untenable position of dealing sharply with its wards—a position respondent cannot in decency afford to take.

B. The Practical Interpretation of the Treaties

Petitioners' construction of the Shoshone treaties is also supported by the practical construction the treaty has received both administratively and legislatively.

[84a] See note 32, *ante*.

Subsequent recommendations to extinguish title. Administrative officials of the Government and legislature have persistently viewed the Treaty of Box Elder as establishing petitioners' rights to their lands. Thus, shortly after the Shoshone treaties were executed, the Commissioner of Indian Affairs, in annual report for 1863, reported:

> "* * * From the representations made by Governor Doty, we have reason to believe that those treaties have been entered into by the Indians with the sincere desire for peace, and I have no doubt that the friendly relations thus inaugurated may be maintained by wise and judicious action on our part. * * * Now that this desideratum has been attained, I respectfully recommend that measures be taken for the negotiation of *further treaties* with the Indians, *having for their object the extinguishment of their title to the soil*, and the setting apart of a suitable portion of the public domain upon which they may be concentrated; and so provided for that they need not be compelled to resort to plunder in order to sustain life." (Italics added.)[85]

Two years later, Congress, by Act of February 23, 1865, 13 Stat. 432, authorized the President to enter into treaties with the various tribes of Indians in Utah Territory to provide "for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (Fdg. 22, R. 58-59). Although this was an admission by both the Commissioner of Indian Affairs and Congress that the respondent had rec-

---

[85] *Ann. Rep. Comm'r. Ind. Affs.* (1863), pp. 37, 38; appendix, pp. 18-19.

ognized petitioners' title and that petitioners' land could not thereafter, without breach of the government's treaty obligations, be taken without petitioners' consent (or the payment of compensation), no further treaty or agreement was ever negotiated, made, or attempted to be made, with the petitioner bands of Shoshone Indians, or any of the other bands of the Shoshone Tribe, other than the Eastern Bands of the Shoshone Tribe with which a treaty was made July 3, 1868, ratified February 16, 1869, and proclaimed February 24, 1869 (15 Stat. 673) (R. 59). For the taking by respondent of these substituted lands, the Eastern Shoshones recovered in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 299 U. S. 476; 304 U. S. 111.

Admissions by Administrative Officers of Treaty Recognition.

Even after this suit was started, the administrative officers having to do with Shoshone lands admitted that Shoshone ownership was recognized by the Shoshone Treaties. The Secretary of Interior in his report to the Attorney General in this case, pursuant to the Act of June 25, 1868, C. 71, 15 Stat. 76, § 6, 5 U. S. C. § 91, which requires the administrative departments to report on cases pending in the Court of Claims, which report was filed as evidence by respondent, states that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians by the treaties of July 2, 1863 (18 Stat. L., 685), July 30, 1863 (13 Stat. L., 663), October 1, 1863 (18 Stat. L., 689), and July 3, 1868 (15 Stat. L., 673)" (R. 84); again the "Government recognized all the land as belonging to the Northwestern bands

of Shoshones" (R. 92). The Commissioner of the General Land Office in reporting to the Secretary of Interior referred to the land described in the Box Elder treaty as the "land in the States of Utah and Nevada within the boundaries of the Shoshoni Indian Reservation (Northwestern Band), Treaty of July 30, 1863 (13 Stat. 663)" (R. 98).

The Court erred in excluding certain documents bearing on Administrative Construction.

At the argument of the case below (which is known as the trial) petitioners, in accordance with a practice that had grown up in the Court of Claims, offered in evidence certified copies of certain correspondence between Senator D. Worth Clark of Idaho and the Department of Interior as showing admissions by that Department of treaty recognition of petitioners' title. The court permitted the correspondence to be filed; and petitioners therefore understood, in accordance with the usual practice, that it was in evidence. When petitioners applied, however, for a transcript of the record, petitioners were informed for the first time that this correspondence had been excluded (R. 82) Petitioners were, however, allowed an exception and the evidence thus offered is printed in the record (R. 103-114).

The evidence was excluded by the court in chambers without any notice thereof being given on the ground that respondent did not have opportunity "to meet and answer," "by examination of witnesses or the offer of other evidence, any statements or alleged facts therein contained." Since, however, the documents were offered merely to show administrative interpretations of the Shoshone treaties, which were not printed in any public documents, it is submitted they should have been received.

A summary of those documents, which clearly show that the Department of Interior interpreted the Shoshone Treaties as recognizing title of petitioners, follows:

On April 20, 1939, Senator Clark wrote Secretary of Interior Ickes as follows (R. 113):

> "In order that I may be better advised in connection with pending legislation as to the claims of the Bannock and Shoshone Indians, many of whom are now located in my state, I would appreciate your having prepared for me by one of your map experts a map showing the lands set apart for each of the five divisions of the Shoshone Nation by five treaties negotiated in 1863."

On May 12, 1939, William Zimmerman, Jr., Assistant Commissioner of Indian Affairs, transmitted the request of Senator Clark to Hon. Fred. W. Johnson, Commissioner of the General Land Office. In his letter of transmittal, Assistant Commissioner Zimmerman said (R. 105-6):

> "While the areas described in the treaties were recognized as being in the possession of the Shoshone Indians, and no part, except that recognized as Eastern Shoshone land, was ever ceded to the United States, it was practically all disposed of as public lands of the United States. No accurate maps of the lands so recognized and so disposed of by the United States have ever been constructed.
>
> "A careful study has been made of the calls of the treaties, and a description thereof has been prepared in the light of information available to this Office for both the exterior and the interior boundaries. A copy thereof is transmitted for what it may be worth in assisting your office in the construction of the map."

The map was prepared and transmitted by the Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs (R. 104-5). The Acting Secretary of Interior then forwarded the map to Senator Clark under a letter of transmittal reading in part as follows (R. 103-4):

> "In further reference to your letter of April 20, in which you requested preparation of a map showing lands set apart for the Shoshone Indians under each of the five treaties in 1863 with the various divisions of the Nation, there is enclosed a map prepared in answer thereto.
>
> "The map was prepared in the General Land Office and follows closely the call of the treaty as formerly interpreted by Governor Doty. There is enclosed a copy of a letter from the Assistant Commissioner, Office of Indian Affairs, to the Commissioner of the General Land Office of May 12 in which certain information was furnished and citations were given to documents from which the lines were more readily determined. There is also enclosed a copy of the letter from the Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs transmitting the map to that Office.
>
> "In addition to the citations mentioned in the letters between the two Offices above-mentioned, access was had to certain maps and documents from the Geological Survey in determining the dividing lines between the different bands of the Nation, parties to these various treaties." (R. 103)

The above letter should have been admitted since it identifies the map (Plf's Exhibit 5) which was admitted without objection and is in the record (Item 4[g], R. 81), and shows the interpretation given the treaty by those charged

with management of our Indian affairs. There was and is no doubt that copies of documents certified by the Indian Office are evidence equally with the originals. 25 U. S. C. § 6. Evidence, outside the treaty, is admissible to show the meaning attributed by the Indians to the language chosen. *Jones* v. *Meehan*, 175 U. S. 1. How much more must that evidence be admissible where it shows what the government officials themselves understand to be the meaning, and where that understanding is adverse to the construction given by the government in defense of a suit on the treaty.

But even if the above letters could not be regarded as "evidence" in the ordinary sense, since offered merely on the question of administrative interpretation of the meaning of the treaties and not as proof of a disputed fact, as is adversary evidence, still this Court should take judicial notice of them, as administrative interpretations. In this respect, they are no different than the unreported opinions of a court, which this and other courts habitually receive for the assistance they may give in the determination of a mooted question of law. If this correspondence were printed in an official government document, it could be cited in briefs without being introduced in evidence. It should have the same status here, since there is no question as to its authenticity in the light of the certification of the copies.

III

PURPORTED FINDINGS OF FACT DO NOT PRECLUDE THIS COURT FROM PROPERLY INTERPRETING PETITIONERS' TREATY

The court below incorporated its interpretations of the treaty in the form of findings of fact. By Finding 15, R. 55, the court below in varying language purported to find

as a "fact" that the United States did not by the treaty of Box Elder negotiate or agree with respect to any acknowledgment or recognition of petitioners' title,[86] and by finding 21, R. 58, that the United States did not intend to recognize or acknowledge petitioners' title, but on the contrary had ever exercised dominion and complete ownership over the land for which petitioners claimed compensation.[87]

---

[86]Finding 15 reads in part as follows: "In negotiating and making these five treaties with the various groups or bands of Shoshone and Bannock Indians, the treaty commissioners representing the United States and the Indians did not negotiate or agree with reference to the acknowledgment by the United States of any exclusive use and occupancy right or title of the Indians to the territory to the extent described or claimed by them at the request of the treaty commissioners; nor did the treaty commissioners on behalf of the United States negotiate or agree with the Indians with reference to the relinquishment by the Indians of any claim which they might make or have with reference to any territory. It was not the purpose of the treaty commissioners to agree or acknowledge on behalf of the United States as to any rights or title to any territory or as to boundaries and they made no attempt to ascertain accurately the boundaries of any territory which the Indians may have actually occupied, possessed and used to the exclusion of other Indians or tribes of Indians. The matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy, as a stipulation or acknowledgment in the treaties, did not enter into the negotiations and was left out of consideration in the drafting and making of the treaties in question" (R. 55-6).

[87]Finding 21 reads as follows: "Prior to and at the time of the making and the ratification of the treaty with plaintiff bands of the Shoshone Indians, the United States had not recognized and did not, at that time, recognize a right of exclusive use, occupancy, and possession in plaintiff bands as against the United States to any territory which was within the Mexican Cession and included in that described by Pocatello, and now claimed by plaintiff bands. The treaty of July 30, 1863, with plaintiff bands contained no express or implied stipulation of recognition or acknowledgment by the United States of any right, title, or interest

Clearly, the question of whether the United States recognized or intended to recognize petitioners' title (presented by both findings 15 and 21) is ascertainable only by an interpretation of the treaty which is exclusively a matter of law reviewable by this Court. *Jones* v. *Meehan*, 175 U. S. 1, 32 (and cases cited), wherein it was held that a treaty with the Red Lake and Pembina bands of Chippewa Indians granting a "reservation" of 640 acres for the Chief Moose Dung, conveyed the land in fee simple, rather than conveying a mere right of occupancy. Or, as was held in *Utah & N. R. Co.* v. *Fisher*, 116 U. S. 28, 32-33, in the face of both a stipulation of the parties and a finding of fact by the trial court that certain lands were within the boundaries of and upon an Indian reservation, "The stipulation and finding must, however, be read with reference to the legislation of congress" and could not be accepted "as to an alleged fact which that legislation shows does not exist." See, also, *Bell* v. *Bruen*, 1 How. 169, 183.

But even if it were a mixed question of law and fact, there has been brought to this Court under the provisions of the Act of May 22, 1939, c. 140, 53 Stat. 752, all "those portions of the original records * * * material to the errors assigned" (R. 82). In addition, the court below takes judicial notice of evidence appearing in public documents

---

in any land, and the United States, in making and ratifying the treaty, did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto. On the contrary, the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation. The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end" (R. 58).

generally available, such as communications appearing in reports of the Commissioner of Indian Affairs (*Temple* v. *United States*, 248 U. S. 121, 130) and, under the settled rule (*Hanley* v. *Donoghue*, 116 U. S. 1, 6-7), this Court will take judicial notice of facts which are within the judicial knowledge of the court being reviewed. There is, therefore, no inhibition of a jurisdictional nature which prevents this Court from examining the very substance of all the matters asserted. And this evidence we submit is all against the holding of the court below.

The further finding of the court (Fdg. 21, R-58), that "the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation" is clearly wrong as a matter of law. "Dominion" in the sense of sovereignty dates from the time that the United States was recognized as the new sovereign by the former sovereigns—in the case of petitioners' land located in Idaho, this occurred upon consummation of the Oregon Treaty of June 15, 1846, with Great Britain (9 Stat. 869); in the case of petitioners' land located in Utah and Nevada, this occurred upon the consummation of the Treaty of Guadalupe Hidalgo with Mexico February 2, 1848 (9 Stat. 922). But the only property interest in the land the United States acquired by these treaties was that of becoming the owner of the possibility of revertor called in Indian law, the "ultimate fee." The Indian title of all the land obtained from Mexico as well as that conceded by Great Britain, was preserved, as just recently reasserted by this Court in *United States of America, as Guardian, etc.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339. And respondent by entering into a treaty with these Indians, recognized rather than extinguished that title.

Granting that the United States has acted to dispose of the property to railroads, to states for schools, and for other purposes, and has set up forest reserves and reservations for other Indians,[88] it does not follow that it so acted because it felt petitioners had no title, even if such unilateral interpretation had any significance. We have set out above (p. 14) that the respondent's officers, following petitioners' treaty sought leave to extinguish petitioners' title in the only way in which that could be fairly done—by bilateral agreement of the parties to the treaty; and that Congress authorized negotiations to that end—which negotiations for some reason never were undertaken. This overcomes any inference that the United States had no idea that petitioners had a rightful title to the area.

Were the fact of exercise of "complete ownership" ever to be controlling, it would be impossible for an Indian tribe to recover for the taking of its lands. But the unilateral appropriation of the land does not either change the meaning of the treaties or destroy the rights of Indian tribes

---

[88]Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356; and Act of July 27, 1866, 14 Stat. 492 (railroads). Enabling acts granted certain numbered sections to Idaho, Utah and Nevada for school and other public purposes; see Act of July 3, 1890, 26 Stat. 216 (Idaho); Act of July 16, 1894, 28 Stat. 107 (Utah) and Act of March 21, 1864, 13 Stat. 30 (Nevada). In connection with establishment of forest reserves, see Replies of Asst's Sec. of the Interior dated April 29, 1936, R. 96. See Executive order of June 14, 1867, establishing Fort Hall Indian Reservation, 1 Kappler 838. In March, 1868, the United States opened a land office for the Territory of Utah and soon thereafter began disposing of the lands under the homestead and other public-land laws. See Ann. Reps. Commr. G. L. O. 1868, pp. 63-68; 1869, pp. 168-174. For information concerning similar action with reference to Idaho and Nevada, see Ann. Reps. Commr. G. L. O. 1868, pp. 55-59, 59-63; 1869, pp. 163-168, 177-184.

thereunder. Once Congress passes a jurisdictional act, and the matter becomes subject to judicial determination, the Indians can recover for such breaches of agreement—not be denied recovery because of them. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 496-498; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123. It follows that the breach cannot be taken as proof that there never was a contract recognizing the Indian ownership; that respondent cannot profit by its own wrong.

CONCLUSION

The United States, by the Shoshone treaties, recognized the Indian title of petitioners to certain land, and obtained rights of way over and easements therein, which it used to its benefit. The subsequent taking of such land by respondent was in derogation and violative of the recognition accorded by the treaties. Petitioners, therefore, as reported to Congress by the Secretary of the Interior, asserted "*under the treaties mentioned* * * * claims against the United States for large tracts of land in Northern Utah and Nevada, and in Southern Oregon and Idaho, and which lands, they allege, were disposed of by the Government without a cession by or consent of these Indians." (S. Rep. No. 519, 70th Cong., 1st Sess.) With this report of the Secretary of Interior before it, Congress authorized the Court of Claims to adjudicate any claim which petitioners "may have against the United States arising under or growing out of the treaty of July 2, 1863 [Northwestern Shoshone Treaty] * * *; treaty of July 30, 1863 [Eastern Shoshone Treaty] * *, and any subsequent treaty * *." (45 Stat. 1407;

Appendix p. 1.) Petitioners having established the case thus contemplated by Congress, are, under the applicable decisions of both this Court and the court below (involving similar jurisdictional bills), entitled to recover. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 304 U. S. 11; *United States* v. *Creek Nation*, 295 U. S. 103; *United States* v. *Klamath and Moadock Tribes*, 304 U. S. 119; *Fort Berthold Indians* v. *United States* 71 C. Cls. 308; *Assiniboine Indian Tribe* v. *United States* 77 C. Cls. 347; *Crow Nation* v. *United States* 81 C. Cls. 238; *Omaha Tribe of Indians* v. *United States* 53 C. Cls. 549.

The judgment below should be reversed.

Respectfully submitted,

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Attorneys for Petitioners.

JOHN W. CRAGUN,
HERMAN J. GALLOWAY,
FRANK K. NEBEKER,
CHARLES J. KAPPLER,
CLINTON D. VERNON,
Of Counsel.